

Exhibit 6

SUMMONS (CITACION JUDICIAL)

SUM-100

NOTICE TO DEFENDANT:**(AVISO AL DEMANDADO):**

CITY AND COUNTY OF SAN FRANCISCO, SAN FRANCISCO BOARD OF APPEALS, RANDALL KNOX, MICHAEL GARCIA, KATHERINE ALBRIGHT, FRANK FUNG, ROBERT HAALAND, (In their capacity as Members of the Board of Appeals) and DOES 1 through 20, inclusive

YOU ARE BEING SUED BY PLAINTIFF:**(LO ESTÁ DEMANDANDO EL DEMANDANTE):**

REGAN CARROLL TRUST, Regan Carrol, trustee,

FOR COURT USE ONLY
FILED IN COURT
MAYOR'S OFFICE

07 JUL 23 PM 4:17

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form. If you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted puede usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol/), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.courtinfo.ca.gov/selfhelp/espanol/) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:

(El nombre y dirección de la corte es):

San Francisco Superior Court
400 McAllister Street
San Francisco, CA 94102
Unlimited Civil Jurisdiction

CASE NUMBER: 07-07-463565
(Número del Caso)

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Andrew M. Zacks, (SBN 147794) 415-956-8100 415-288-9755
ZACKS UTRECHT & LEADBETTER, PC
235 Montgomery Street, Suite 400
San Francisco, CA 94104

DATE: 5/21/2007

(Fecha)

GORDON PARK-LI
Clerk, by [Signature]
(Secretario)

Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons (form POS-010).)

NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.

2. ☐ as the person sued under the fictitious name of (specify):

3. ☐ on behalf of (specify):

under: ☐ CCP 416.10 (corporation)

☐ CCP 416.20 (defunct corporation)

☐ CCP 416.40 (association or partnership)

☐ other (specify):

☐ CCP 416.60 (minor)

☐ CCP 416.70 (conservatee)

☐ CCP 416.90 (authorized person)

4. ☐ by personal delivery on (date):



**City & County of San Francisco City Attorney's Office
Litigation Log Sheet**

File # 080138
Case Name Regan Carroll Trust, Regan Carroll, Trustee

From Case: 070412

Disposition

Full Caption

Trust of Regan Carroll, Regan Carroll, Trustee v. CCSF, SF Board of Appeals, et al and Does 1-20, inclusive

Department: PAB: PAB Board of Appeals

Cause Code: Miscellaneous

Subject

CASE NUMBER: CGC-07-463565 REGAN CARROLL et al VS. CITY AND COUNTY OF SAN FRA

NOTICE TO PLAINTIFF

A Case Management Conference is set for:

DATE: OCT-19-2007

TIME: 9:00AM

**PLACE: Department 212
400 McAllister Street
San Francisco, CA 94102-3680**

All parties must appear and comply with Local Rule 3.

CRC 3.725 requires the filing and service of a case management statement form CM-110 no later than 15 days before the case management conference.

However, it would facilitate the issuance of a case management order without an appearance at the case management conference if the case management statement is filed, served and lodged in Department 212 twenty-five (25) days before the case management conference.

Plaintiff must serve a copy of this notice upon each party to this action with the summons and complaint. Proof of service subsequently filed with this court shall so state.

ALTERNATIVE DISPUTE RESOLUTION POLICY REQUIREMENTS

IT IS THE POLICY OF THE SUPERIOR COURT THAT EVERY CIVIL CASE PARTICIPATE IN EITHER MEDIATION, JUDICIAL OR NON-JUDICIAL ARBITRATION, THE EARLY SETTLEMENT PROGRAM OR SOME SUITABLE FORM OF ALTERNATIVE DISPUTE RESOLUTION PRIOR TO A MANDATORY SETTLEMENT CONFERENCE OR TRIAL.
(SEE LOCAL RULE 4)

Plaintiff must serve a copy of the Alternative Dispute Resolution Information Package on each defendant along with the complaint. All counsel must discuss ADR with clients and opposing counsel and provide clients with a copy of the Alternative Dispute Resolution Information Package prior to filing the Case Management Statement.

[DEFENDANTS: Attending the Case Management Conference does not take the place of filing a written response to the complaint. You must file a written response with the court within the time limit required by law. See Summons.]

Superior Court Alternative Dispute Resolution Coordinator
400 McAllister Street, Room 103
San Francisco, CA 94102
(415) 551-3876

See Local Rules 3.6, 6.0 C and 10 D re stipulation to commissioners acting as temporary judges

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):

Andrew M. Zacks (SBN 147794)
Zacks, Utrecht & Leadbetter, PC
235 Montgomery Street, Suite 400
San Francisco, CA 94104

TELEPHONE NO: 415-956-8100

FAX NO. (Optional):

E-MAIL ADDRESS (Optional):

ATTORNEY FOR (Name): Trust of Regan Carroll

SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Francisco

STREET ADDRESS: 400 McAllister Street

MAILING ADDRESS:

CITY AND ZIP CODE: San Francisco, CA 94102

BRANCH NAME: Unlimited Civil Jurisdiction

PETITIONER/PLAINTIFF: Trust of Regan Carroll, Regan Carroll
Trustee

RESPONDENT/DEFENDANT: City and County of San Francisco, et al.

FOR COURT USE ONLY

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07 JUL 23 PM 4:17

CASE NUMBER:

463565

JUDGE:

DEPT.:

PROOF OF SERVICE—CIVIL

Check method of service (only one):

- ☐ By Personal Service ☐ By Mail ☐ By Overnight Delivery
☒ By Messenger Service ☐ By Facsimile ☐ By E-Mail/Electronic Transmission

(Do not use this Proof of Service to show service of a Summons and Complaint.)

1. At the time of service I was over 18 years of age and not a party to this action.

2. My address is (specify one):

a. ☒ Business: 235 Montgomery St. Suite 400 b. ☐ Residence:
San Francisco, CA 94104

3. On (date): 7/23/2007 I served the following documents (specify): Complaint for Injunction and
Declaratory Relief, Summons, Notice to Plaintiff

☐ The documents are listed in the Attachment to Proof of Service—Civil (Documents Served) (form POS-040(D)).

4. I served the documents on the persons below, as follows:

a. Name of person served:

b. Address of person served:

c. Fax number or e-mail address of person served, if service was by fax or e-mail:

d. Time of service, if personal service was used:

☒ The names, addresses, and other applicable information about the persons served is on the Attachment to Proof of Service—Civil (Persons Served) (form POS-040(P)).

5. The documents were served by the following means (specify):

- a. ☐ By personal service. I personally delivered the documents to the persons at the addresses listed in Item 4.
(1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

CASE NAME Trust of Regan Carroll v. CCSF

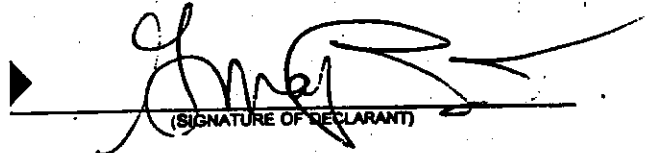
CASE NUMBER:
463565

- 5 b. ☐ By United States mail. I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 4 and (specify one):
- (1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
- (2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.
- I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at (city and state):
- c. ☐ By overnight delivery. I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 4. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
- d. ☒ By messenger service. I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 4 and providing them to a professional messenger service for service. (A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.)
- e. ☐ By fax transmission. Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 4. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.
- f. ☐ By e-mail or electronic transmission. Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed in item 4. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 7/23/2007

Gina Robertson
(TYPE OR PRINT NAME OF DECLARANT)


(SIGNATURE OF DECLARANT)

(If item 5d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

DECLARATION OF MESSENGER

- ☐ By personal service. I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 4. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package, which was clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on (date): 7/23/2007

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 7/23/2007

LANCE MITCHELL
(NAME OF DECLARANT)


(SIGNATURE OF DECLARANT)

SHORT TITLE: Regan Carroll Trust v. CCSF et al.

CASE NUMBER:

463565

ATTACHMENT TO PROOF OF SERVICE—CIVIL (PERSONS SERVED)*(This Attachment is for use with form POS-040)***NAMES, ADDRESSES, AND OTHER APPLICABLE INFORMATION ABOUT PERSONS SERVED:**Name of Person ServedAddress (business or residential)Fax or E-mail (as applicable) Where ServedTime of Service
(for personal service)

Office of the Mayor	City Hall, Room 200 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102	Time: _____
Board of Appeals	1660 Mission Street San Francisco, CA 94103	Time: _____
Kristin Jensen	City Hall, Room 234 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102	Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
		Time: _____
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		Time: _____
		Time: _____
		Time: _____

ATTACHMENT TO PROOF OF SERVICE—CIVIL (PERSONS SERVED)
(Proof of Service)Legal
Solutions
& Plus

Page ___ of ___

FILED
San Francisco County Superior Court

MAY 21 2007

GORDON PARK-LI, Clerk

Deputy Clerk

OCT 19 2007 - 9:40 AM

SUPERIOR COURT - STATE OF CALIFORNIA **SUMMONS ISSUED**

COUNTY OF SAN FRANCISCO - UNLIMITED CIVIL JURISDICTION

REGAN CARROLL TRUST, Regan
Carroll, trustee,

Plaintiff,

v.

CITY AND COUNTY OF SAN
FRANCISCO, SAN FRANCISCO
BOARD OF APPEALS,
RANDALL KNOX, MICHAEL GARCIA,
KATHERINE ALBRIGHT, FRANK
FUNG, ROBERT HAALAND, (In their
capacity as Members of the Board of
Appeals) and DOES 1 through 20,
inclusive,

Defendants.

CASE NO. 07-463565

COMPLAINT FOR INJUNCTION
AND DECLARATORY RELIEF

(Cal Gov. Code § 54950, et seq.)

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INTRODUCTORY ALLEGATIONS

1. Plaintiff Regan Carroll Trust is a private trust established in the state of California. Regan Carroll is its trustee. The trust owns the real property, located at 1179-1189 Tennessee Street, San Francisco (the "Premises") which is the subject of the permit at issue in this action, and venue is proper in this judicial district.

2. Defendant City and County of San Francisco ("City") is a municipal agency of the State of California. San Francisco Board of Appeals ("Board of

1 Appeals"), is appointed by the City Board of Supervisors and is responsible under
2 the City Charter and the San Francisco Administrative Code for review of building
3 permits granted by the San Francisco Planning Department. As such, the Board of
4 Appeals is a legislative body of a local agency within the definition of the California
5 Public Meetings Law, Government Code Section 54950, et seq. (the "Ralph M.
6 Brown Act") and is subject to the San Francisco Administrative Code, Chapter 67,
7 (the "Sunshine Ordinance").
8

9 3. Named Board of Appeal members, Randall Knox, Michael Garcia,
10 Katherine Albright, Frank Fung, Robert Haaland, were nominadted by the Mayor of
11 the City and County of San Francisco or the President of the Board of Supervisors
12 and approved by the Board of Supervisors pursuant to San Francisco City Charter
13 §4.106. The Board of Appeals is a legislative body of a local agency under the Brown
14 Act and the Sunshine Ordinance and the individual members are responsible for the
15 observance of those laws.
16
17

18 4. Plaintiff is ignorant of the true names and capacities of defendants
19 sued herein as Does one through twenty, inclusive, and therefore sues these
20 defendants by such fictitious names. Plaintiff will amend this complaint to allege
21 their true names and capacities when ascertained. Plaintiff is informed and believes
22 and thereon alleges that each of these fictitiously named defendants are responsible
23 in some manner for the occurrences herein alleged, and that plaintiff's injuries as
24 herein alleged were proximately caused by the aforementioned defendants.
25

26 5. Underlying this complaint is a construction permit application Plaintiff
27 had filed with the City's Planning Department and which was denied.
28

6. On March 7, 2006, Board of Appeals met and denied Plaintiff's appeal of the denial of the building permit. On April 4, 2006, a rehearing was held and the denial upheld. On, April 6, 2006 Plaintiff served a Cure and Correct demand letter for violations identified at the March 7 meeting. On May 6, 2006 the cure and correct period expired for the letter.

FIRST CAUSE OF ACTION

(Violation of Brown Act & Sunshine Ordinance, Illegal Seriatim Meeting)

7. Plaintiff realleges and incorporates by reference paragraphs 1 through 6 above.

8. The Ralph M. Brown Act at Gov. Code §54953(a) provides that:

"All meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency, except as otherwise provided in this chapter."

9. The San Francisco Sunshine Ordinance at Admin. Code, Section 67.5 provides that:

"All meetings of any policy body shall be open and public, and governed by the provisions of the Ralph M. Brown Act (Government Code Sections 54950 et. seq.) and of this article. In case of inconsistent requirements under the Brown Act and this article, the requirement which would result in greater or more expedited public access shall apply."

10. At the meeting of March 7, 2007, when requested to disclose advice from the City Attorney and to consider recusal of the City Attorney for conflict of interest, the defendant members of the Board of Appeals indicated that contacts have taken place with the City Attorney and that they are entitled to keep such contacts private. Such contacts constitute a seriatim meeting in violation of the

1 provisions of the Brown Act and Sunshine Ordinance set forth above.

2 SECOND CAUSE OF ACTION

3 (Violation of Brown Act & Sunshine Ordinance, Improper Closed Session)

4 11. The allegations of paragraphs 1 through 10 are realleged and
5 incorporated herein by reference.

6
7 12. The Ralph M. Brown Act at Gov. Code §54954.2(a)(1) provides as
8 follows:

9 "At least 72 hours before a regular meeting, the legislative
10 body of the local agency, or its designee, shall post an
11 agenda containing a brief general description of each item of
12 business to be transacted or discussed at the meeting,
including items to be discussed in closed session."

13 13. The Ralph M. Brown Act at Gov. Code §54957.1(a) provides as follows:

14 "The legislative body of any local agency shall publicly
15 report any action taken in closed session and the vote or
16 abstention of every member present thereon, as follows"

17 14. The San Francisco Sunshine Ordinance at 67.8(a) provides as follows:

18 "In addition to the brief general description of items to be
19 discussed or acted upon in open and public session, the
20 agenda posted pursuant to Government Code Section
21 54954.2, any mailed notice given pursuant to Government
22 Code Section 54954.1, and any call and notice delivered to the
23 local media and posted pursuant to Government Code
Section 54956 shall specify and disclose the nature of any
closed sessions by providing all of the following
information."

24 15. In addition, the Sunshine ordinance provides for a list of permitted
25 topics at "Section 67.10, Closed Sessions: Permitted Topics," specifies the extent of
26 disclosure of justifications for the closed sessions at "Sec. 67.11. Statement Of
27 Reasons For Closed Sessions," and requires a disclosure of action and a vote to
28

1 Sunshine Ordinance the Board of Appeals and its members are required to meet only
2 at publicly noticed times and place where public attendance is allowed;

3 4. For a declaration stating that under the Brown Act and the
4 Sunshine Ordinance the Board of Appeals and its members are required to hold all
5 closed sessions meetings at the time and place described in the notice;
6

7 5. For an order directing that all contacts between the City Attorney and
8 members of the defendant Board of Appeals be fully disclosed;

9 6. For attorneys fees incurred in the prosecution of this action in the
10 public interest;

11 7. For costs of suit herein incurred; and

12 8. For such other and further relief as this Court deems fair, just and
13 equitable.
14

15
16 Date: May 21, 2007

ZACKS UTRECHT & LEADBETTER, P.C.

17
18
19 By:  James B. Kraus

Attorneys for Regan Carroll
20
21
22
23
24
25
26
27
28

Exhibit 7

Items 1-5 below must be completed (see instructions on page 2)

2. This case ☐ is ☒ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:

a. <input type="checkbox"/> Large number of separately represented parties	d. <input type="checkbox"/> Large number of witnesses
b. <input type="checkbox"/> Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve	e. <input type="checkbox"/> Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court
c. <input type="checkbox"/> Substantial amount of documentary evidence	f. <input type="checkbox"/> Substantial postjudgment judicial supervision

NOTICE

- Cal. Rules of Court, rules 2.220, 3.400-3.403;
Standards of Judicial Administration, § 19

RECEIVED JUN 05 2007

ENDORSED
FILED
San Francisco County Superior Court
JUN - 5 2007
GORDON PARK-LI, Clerk
BY: PARAM NATT
Deputy Clerk

ANDREW M. ZACKS (CA# 147794)
JAMES B. KRAUS (CA# 184118)
ZACKS UTRECHT & LEADBETTER
235 Montgomery Street, Suite 400
San Francisco, CA 94104
(415) 956-8100

Attorneys for plaintiff Regan Carroll Trust

SUPERIOR COURT - STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO - UNLIMITED CIVIL JURISDICTION

REGAN CARROLL TRUST, Regan)
Carroll, trustee,)
Petitioner,)
v.)
CITY AND COUNTY OF SAN)
FRANCISCO, SAN FRANCISCO)
BOARD OF APPEALS, and DOES 1)
through 20, inclusive,)
Respondents.)

CASE NO.

CPF-07-507293

PETITION FOR WRIT OF
ADMINISTRATIVE MANDATE

(CCP § 1094.5)

1. Petitioner Regan Carroll Trust is a private trust established in the state of California. Regan Carroll is its trustee. The trust owns the real property, located at 1179-1189 Tennessee Street, San Francisco (the "Property") which is the subject of the permit at issue in this action, and venue is proper in this judicial district.

2. Respondent City and County of San Francisco ("City") is a municipal agency of the State of California. San Francisco Board of Appeals ("Board of Appeals"), is appointed by the City Board of Supervisors and is responsible under the City Charter and the San Francisco Administrative Code for review of building permits granted by the San Francisco Planning Department.

1 3. Petitioner is ignorant of the true names and capacities of Respondents
2 sued herein as Does one through twenty, inclusive, and therefore sues these
3 Respondents by such fictitious names. Petitioner will amend this complaint to
4 allege their true names and capacities when ascertained. Petitioner is informed and
5 believes and thereon alleges that each of these fictitiously named Respondents are
6 responsible in some manner for the occurrences herein alleged, and that Petitioner's
7 injuries as herein alleged were proximately caused by the aforementioned
8 Respondents.
9

10 5. Underlying this complaint is a construction permit application
11 Petitioner had filed with the City's Planning Department and which was improperly
12 denied.
13

14 6. On or about February 11, 1999, Mr. John Stricklin, the then current
15 owner of the Property, submitted Building Permit Application No. 9902819 to the
16 City for a permit to construct a four (4) story, eight (8) unit residential building on
17 the Property. Mr. Stricklin's application included a request for a variance because the
18 proposed building would encroach on the rear yard setback required by the San
19 Francisco Planning Code.
20

21 7. On or about July 28, 1999, the Planning Department issued for public
22 review and comment a Negative Declaration prepared pursuant to the California
23 Environmental Quality Act (hereinafter "CEQA") for Mr. Stricklin's application. The
24 Negative Declaration evaluated potential effects on historic resources and found
25 them to be "not significant," stating: "[i]n the independent judgment of the
26 Department of City Planning, there is no substantial evidence that the project could
27
28

1 have a significant effect on the environment.”

2 8. On or about August 10, 1999, the Planning Department adopted the
3 Negative Declaration and approved the variance request.

4 9. On March 31, 2000, Petitioner acquired title to the Property.

5
6 10. On or about March 31, 2000, Petitioner acquired pending Building
7 Permit Application No. 149902819 by assignment from Mr. Stricklin. Petitioner re-
8 designed the proposed building to eliminate the need for a rear yard variance by
9 removing a portion of rear of the building and reducing the overall building
10 envelope.

11
12 11. The Permit Streamlining Act (“PSA”), at Government Code § 65943,
13 requires the permit issuing agency to notify the applicant when and why an
14 application is “incomplete” and also when it is “complete.” On or about June 26,
15 2001, the City approved the site Permit plans for building Permit Application No.
16 9902819 and provided notice to Petitioner that the Building Permit Application No.
17 9902819 was complete for purposes of the PSA.

18
19 12. Under the PSA at Government Code § 65944, once the permit issuing
20 agency accepts the application as complete, it cannot require that the applicant
21 submit any new categories of information not previously identified, though the
22 agency may “in the course of processing the application, request the applicant to
23 clarify, amplify, correct, or otherwise supplement the information required for the
24 application.”

25
26 13. Between June 26, 2001 and November of 2005, the City requested, and
27 Petitioner provided, additional supplemental information for purposes of the City’s
28

1 review and approval of various "Technical Addenda" to the Site Permit plans for
2 Building Permit Application No. 99028 19 relating to mechanical, structural and
3 other matters specified by the San Francisco Building Code.

4 14. In or about June of 2005, and again on or about November 14, 2005 the
5 City approved all of the required Technical Addenda for Building Permit Application
6 No. 99028 19.

7 15. On or about November 14, 2005 the City notified Petitioner that his
8 permit was ready for issuance upon proof of payment to the San Francisco Unified
9 School District of school facilities fee.

10 16. On December 2, 2005, Petitioner paid the school facilities fee, appeared
11 at the City's Central Permit Bureau, presented his receipt for payment of the school
12 facilities fee and requested that his building permit be issued. The City refused to
13 issue the requested building permit to Petitioner.

14 17. Since its refusal to issue the requested building permit to Petitioner
15 December 2, 2005, the City has informed Petitioner that it will not issue the
16 requested building permit and will deny Building Permit Application No. 99028 19
17 unless and until he submits to the City for its discretionary approval an application
18 for a Certificate of Appropriateness pursuant to Article 10 of the San Francisco
19 Planning Code.

20 18. Article 10 of the San Francisco Planning Code is the City's historic
21 preservation ordinance, 16 adopted in 1967. Article 10 requires the submission and
22 approval of an application for a Certificate of Appropriateness for certain
23 development projects located in areas of the City that have been designated as
24
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1 "historic districts." On April 18, 2003, almost two years after the City found the
2 application and approved the Site Permit, the City designated the Dogpatch
3 neighborhood in which Petitioner's property is located as a "historic district" by
4 adopting Appendix L to Article 10.

5
6 19. At no time before December 2, 2005 did the City ever inform Petitioner
7 that he would be required to submit to the City for its discretionary approval an
8 application for a Certificate of Appropriateness pursuant to Article 10 of the San
9 Francisco Planning Code.

10
11 20. The Permit Streamlining Act was enacted in 1977, when the California
12 Legislature added 28 chapter 4.5, entitled "Review and Approval of Development
13 Projects," to the Government Code, commencing with section 65920. The Act's
14 purpose, as stated in Government Code § 65921, is to "ensure clear understanding of
15 the specific requirements which must be met in connection with the approval of
16 development projects and to expedite decision on such projects." The Act was
17 adopted to relieve permit applicants from protracted and unjustified governmental
18 delays in processing their applications for development projects.

19
20 21. Petitioner's Building Permit Application No. 9902819 is a
21 development project subject to the PSA.

22
23 22. Under the PSA at Government Code § 65940, the City is required to
24 compile one or more lists specifying in detail the information required for review and
25 approval of an application for a development project, and to make such lists available
26 to all applicants and to anyone else who requests them. The lists must indicate the
27
28

1 criteria that will be applied in determining whether an application is complete, and
2 the time limits for the review and approval of the applications.

3 23. The City's insistence that Petitioner submit to the City for its
4 discretionary approval an application for a Certificate of Appropriateness pursuant to
5 Article 10 of the San Francisco Planning Code violates the PSA at Government Code
6 § 65944 because it requires information that was not specified in any list compiled by
7 the City pursuant to the PSA at Government Code § 65940 before the City found
8 Building Permit Application No. 9902819 complete.
9

10 24. Under the PSA at Government Code § 65941 and § 69550(a)(3), the
11 permit issuing agency may take steps to comply with CEQA. Here, as noted above,
12 the City complied with CEQA for Building Permit Application No. 9902819 by
13 adopting a Negative Declaration on or about July 28, 1999.
14

15 25. The City failed to approve or disapprove Building Permit Application
16 No. 9902819 within the time allotted by law.
17

18 26. On or about August 9, 2006, Petitioner complied with the PSA by
19 providing 7 days advance notice that he intended to provide public notice that the
20 Project would be deemed approved by operation of law if the City did not approve or
21 disapprove Building Permit Application No. 9902819 within 60 days of said public
22 notice.
23

24 27. On August 30, 2006, Petitioner provided the City and the public with
25 that notice.

26 28. The City failed to comply with its obligations.

27 29. In a December 8, 2006 letter to Petitioner, the Department of Building
28

1 Inspection stated that the applications have "not been approved" by the Department
2 of City Planning. Petitioner submitted a "Request for Disapproval of Building
3 Permit Application" and appealed to the Board of Appeals timely.

4 30. On March 7, 2006, the Board of Appeals met and initially voted in favor
5 of Petitioner, agreeing that he had a deemed-approved permit. The City Attorney
6 then improperly and without legal authority castigated the Board, and instructed it
7 that it could not vote in favor of Petitioner, but could only deny the application and
8 refuse to recognize that his permit was deemed approved, which it did by a 1-4 vote.
9

10 31. Thus, the Board of Appeals failed to proceed according to law and
11 acted in derogation of Petitioner's rights under the PSA.
12

13 PRAYER FOR RELIEF

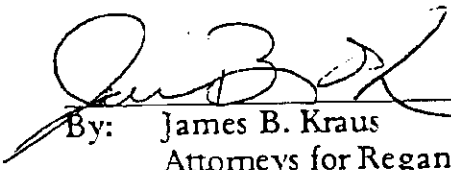
14 WHEREFORE, Petitioner prays for judgment against Respondents, as
15 follows:

16 A. For issuance of a writ of administrative mandate setting aside the decision of
17 the Board of Appeals, and ordering the City and the Board to issue the requested permit.
18

19 B. Other relief as the Court may deem proper, and for costs as allowed by
20 law.

21 Date: June 5, 2007

ZACKS UTRECHT & LEADBETTER, P.C.

22 
23 By: James B. Kraus
24 Attorneys for Regan Carroll
25
26
27
28

VERIFICATION

I, Andrew M. Zacks, am attorney for Petitioner. I am authorized to make this verification on behalf Petitioner. The facts stated in the petition above are true and correct to the best of my knowledge and belief.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

Date: June 5, 2007



Andrew M. Zacks

Exhibit 8

ENDORSED
FILED

San Francisco County Superior Court

MAY 09 2007

GORDON PARK-LI, Clerk

BY: MARYANN MORAN
Deputy Clerk

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CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

TRUST OF REGAN CARROLL,
REGAN CARROLL, TRUSTEE

Petitioner,

vs.

CITY AND COUNTY OF SAN
FRANCISCO DEPARTMENT OF
BUILDING INSPECTION, CITY AND
COUNTY OF SAN FRANCISCO
BUILDING INSPECTION
COMMISSION, CITY AND COUNTY
OF SAN FRANCISCO PLANNING
DEPARTMENT, CITY AND COUNTY
OF SAN FRANCISCO BOARD OF
APPEALS,

Respondents.

Case No. CPF-06-506542

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEMURRER TO AMENDED
PETITION FOR WRIT OF MANDATE
AND ADMINISTRATIVE
MANDAMUS

Hearing Date: June 12, 2007
Hearing Judge: Hon. Patrick J. Mahoney
Time: 9:30 a.m.
Place: Dept. 302

Date Action Filed: September 12, 2006
Trial Date: None Assigned

Attached Documents: Doc Names

TABLE OF CONTENTS

1			
2	TABLE OF AUTHORITIES		ii
3	INTRODUCTION		1
4	STATEMENT OF FACTS AND PROCEDURAL HISTORY.....		3
5	I. THE PROPOSED PROJECT.		3
6	II. AMENDMENT OF THE PLANNING CODE APPLICABLE TO NEW		
7	CONSTRUCTION IN THE DOGPATCH HISTORIC DISTRICT.		4
8	III. CITY REVIEW OF THE APPLICATION FOR CONSISTENCY WITH		
9	APPENDIX L.		5
10	IV. ADMINISTRATIVE APPEALS OF THE PLANNING DEPARTMENT'S		
11	ACTION.		6
12	A. APPEAL OF THE REASSERTION OF PLANNING		
13	DEPARTMENT JURISDICTION TO THE BUILDING		
14	INSPECTION COMMISSION.....		6
15	B. APPEAL OF THE ZA DETERMINATION TO THE BOARD OF		
16	APPEALS.		6
17	V. COMMENCEMENT OF THE WRIT ACTION.....		7
18	ARGUMENT.....		7
19	I. LEGAL STANDARD.....		7
20	II. THE AMENDED PETITION FAILS TO STATE A CLAIM FOR WHICH		
21	RELIEF CAN BE GRANTED.		7
22	A. Petitioner is Not Entitled to Issuance of A Permit in Violation of the		
23	Planning Code.....		8
24	B. Even if the Project Were in Compliance With the Planning Code,		
25	Petitioner is Not Entitled to Issuance of a Permit as a Matter of Right.		10
26	III. THE AMENDED PETITION IS TIME BARRED PURSUANT TO		
27	GOVERNMENT CODE SECTION 65009.....		12
28	A. The Building Inspection Commission and Board of Appeals		
	Determinations are Subject to the Statute of Limitations Set Forth in		
	Government Code § 65009		12
	B. Limitations Statutes On Actions Challenging Local Planning		
	Decisions Are Strictly Construed.....		13
	CONCLUSION.....		14

TABLE OF AUTHORITIES**State Cases**

<i>Blank v. Kirwan</i> (1985) 39 Cal.3d 311	14
<i>Ching v. San Francisco Bd. of Permit Appeals</i> (1998) 60 Cal.App.4th 888	13
<i>Dodd v. Citizens Bank of Costa Mesa</i> (1990) 222 Cal.App.3d 1624	7
<i>Guinnane v. San Francisco City Planning Commission</i> (1989) 209 Cal.App.3d 732	11
<i>Hensler v. City of Glendale</i> (1994) 8 Cal.4th 1	13
<i>Land Waste Management v. Contra Costa Board of Supervisors</i> (1990) 222 Cal. App.3d 950	1, 9
<i>Lindell Co. v. Board of Permit Appeals</i> (1943) 23 Cal.2d 303	11, 12
<i>Maginn v. City of Glendale</i> (1999) 72 Cal.App.4th 1102	13
<i>Russian Hill Imp. Ass'n v. Board of Permit Appeals of City and County of San Francisco</i> (1967) 66 Cal.2d 34	2, 8, 9
<i>Selby Realty Co. v. City of San Buenaventura</i> (1973) 10 Cal.3d 110	8, 9, 10
<i>Travis v. County of Santa Cruz</i> (2004) 33 Cal.4th 757	13
<i>Wagner v. City of South Pasadena</i> (2000) 78 Cal.App.4th 943	13, 14
<i>Washington v. County of Contra Costa</i> (1995) 38 Cal.App.4th 890	7
<i>Wells Fargo Bank v. Town of Woodside</i> (1983) 33 Cal.3d 379	8, 9
<i>West Coast Advertising v. City and County of San Francisco</i> (1967) 256 Cal.App.2d 357	9, 10
<i>Wolfe v. State Farm & Casualty Insurance Co.</i> (1996) 46 Cal.App.4th 554	7

State Statutes & Codes**California Code of Civil Procedure**

§ 1013(a)14

California Code of Civil Procedure

§ 108512

California Code of Civil Procedure

§ 1094.512

California Code of Civil Procedure

§ 430.107

California Code of Civil Procedure

§1094.67, 12

California Code of Civil Procedure

§ 11097

California Government Code

§ 650096, 12, 13, 14

California Government Code

§ 6590113

California Government Code

§ 6590313

San Francisco Statutes, Codes & Ordinances**Planning Code**

§10054

San Francisco Building Code

§ 106.4.31, 2, 6, 9

San Francisco Charter

§ 3.1003, 7

San Francisco Municipal Code

Part II, Article 1, Section 262

San Francisco Planning Code

§ 10064

San Francisco Planning Code

§ 1006.24

San Francisco Business and Tax Regulation Code

§ 2611

Respondent City and County of San Francisco (sued herein as the San Francisco Department of Building Inspection, San Francisco Building Inspection Commission, San Francisco Planning Department and San Francisco Board of Appeals; collectively "City") submits this memorandum of points and authorities in support of its demurrer to the Amended Petition for Writ of Mandate ...and Writ of Administrative Mandamus ("Amended Petition"), filed herein on September 12, 2006.

INTRODUCTION

In this action, Petitioner seeks an order from the Court compelling the City to issue a building permit for a proposed four story, eight unit residential building with commercial units on the ground floor ("Project"). Petitioner's property is located in the area designated as the Dogpatch Historic District of San Francisco. The building permit application for the Project ("Application"), initially filed in 1999, was then pursued sporadically by Petitioner over the next several years as his personal circumstances permitted. Petitioner admits that the Planning Code was amended during the protracted pendency of the Application, and now requires that all projects proposed for the Dogpatch Historic District be reviewed for consistency with applicable Planning Code provisions prior to issuance of the permit. Such review, which takes the form of a Certificate of Appropriateness, was never sought or received by Petitioner. In fact, Petitioner argues that the Project should not be required to comply with otherwise applicable changes in the Planning Code that were enacted subsequent to the filing of its Application, but prior to final issuance of the building permit. Petitioner's arguments are contrary to well-established law and, as a result, the Amended Petition should be dismissed without leave to amend.

"Under established law local government agencies are *powerless* to issue land-use permits which are inconsistent with governing legislation." (*Land Waste Management v. Contra Costa Board of Supervisors* (1990) 222 Cal. App.3d 950, 959 (italics in original).) This includes permits that would be in violation of planning and zoning ordinances [*Id.*] Similarly, San Francisco Building Code § 106.4.3 prohibits issuance of building permits that are not in conformity with the Planning Code and all other applicable law. Any permit issued in violation of the Planning Code is legally invalid and may be set aside as ultra vires. (*Land Waste Management, supra* 222 Cal App.

3d at 958.) As a result, it is a well-settled principle of administrative law that, until a permit is finally granted, the Building and Planning Departments, and all administrative agencies and courts considering a permit application, must apply the Planning Code in effect at the time of review. Applying this principal, the California Supreme Court has long held that "one who is not yet armed with a presently effective municipal license to proceed with construction must assume the risk that, before final action [has] been taken on [his] application' [citation omitted], the law might be changed so as to require that his application be denied." (*Russian Hill Imp. Ass'n v. Board of Permit Appeals of City and County of San Francisco* (1967) 66 Cal.2d 34, 40.)

Even in the absence of these authorities, the relief Petitioner seeks is not available, because this Court cannot usurp the City's independent discretion and compel issuance or denial of a permit that is the subject of such discretion. At most, the Court could order that the City *exercise its discretion* and either grant, or deny the permit, as provided by Part II, article 1, section 26 of the San Francisco Municipal Code ("Section 26"), and render a decision to issue or deny the requested permit.

Finally, each of Petitioner's claims is barred by the applicable statute of limitations. The first cause of action challenges a decision by the City's Building Inspection Commission ("BIC"), which concluded that the Planning Department had properly reasserted jurisdiction over the Application prior to issuance of the building permit in order to review the Project for consistency with provisions of the Planning Code adopted and effective in 2003. The BIC specifically determined that the permit had not issued at the time that the Planning Department reasserted jurisdiction to review the Project for conformity with the Planning Code. The BIC determination effectively conditioned issuance of the Project permit on compliance with the Planning Code and all other applicable law, as is required by San Francisco Building Code § 106.4.3. The second cause of action challenges a decision by the San Francisco Board of Appeals ("BOA") upholding the Zoning Administrator's request that the Department of Building Inspection ("DBI") route all future permits and correspondence to the Planning Department, and notification of the Petitioner that the Project would be reviewed for consistency with Planning Code provisions relating to the Dogpatch Historic

District. Both of the challenged City actions stem from the City's application of Planning Code Section 312, Article 10 and Appendix L to the Project.

Challenges to local planning decisions, to the reasonableness or legality of conditions imposed on any permit, and to determinations by the Zoning Administrator and the BOA are all governed by the 90-day statute of limitations set forth in Government Code § 65009(c). That section provides that "no action or proceeding shall be maintained in [any such case] by any person unless the action or proceeding is commenced *and service is made*" on the administrative agency within 90 days after that body's decision (emphasis added). Here, the BIC's determination was final as a matter of law on May 8, 2006, and the BOA decision was final on June 14, 2006. Although Petitioner filed his original petition on August 4, 2006, Petitioner never served that petition on the City. Instead, the First Amended Petition was filed on September 12, 2006, and was served on the Mayor's Office in compliance with San Francisco Charter § 3.100 on September 27, 2006. This service was effected 142 days after the BIC decision was final, and 105 days following the final BOA decision. Section 65009 serves as an absolute jurisdictional bar to Petitioner's challenges to the City's determinations.

For the reasons set forth herein, the Amended Petition should be dismissed in its entirety and without leave to amend.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. THE PROPOSED PROJECT.

The site of the proposed Project in this case is 1179-89 Tennessee Street (the "Property") [Amended Petition at ¶1], located in the Dogpatch Historic District of the City. [*Id.* at ¶11 and Exh. A, Exh. B ¶5.] Petitioner's predecessor in interest on the Property filed an application to construct a four-story residential and commercial project on the site in 1999. [Amended Petition at ¶2.] Thereafter, Petitioner rescinded its sales contract with the previous owner, and assumed all rights and obligations under the Application in 2000. [*Id.*] Over the course of the next five years, Petitioner pursued the Application sporadically, as his personal circumstances (including the death of a family member) permitted. [*Id.* at ¶2 and Exh. B at p. 2, ¶2.] During that time, the Planning Department reviewed and approved various aspects of the Project, including the addenda drawings.

[Amended Petition at ¶3.] The Planning Department review of and revisions to the addenda drawings continued through mid-November, 2005. [*Id.*]

II. AMENDMENT OF THE PLANNING CODE APPLICABLE TO NEW CONSTRUCTION IN THE DOGPATCH HISTORIC DISTRICT.

In 2003, while the application was pending, the San Francisco Board of Supervisors adopted legislation designating the Dogpatch Historic District and requiring review of all projects proposed in the district for consistency with Appendix L (Dogpatch Historic District) to Article 10 (Preservation of Historical Architectural and Aesthetic Landmarks) of the Planning Code ("Appendix L"). [*Id.* at ¶6.] Article 10 requires, among other things, that

(a) No person shall carry out or cause to be carried out on a designated landmark site or in a designated historic district any construction ... for which a City Permit is required, except in conformity with the provisions of this Article 10. In addition, no such work shall take place unless all other applicable laws and regulations have been complied with, and any required permit has been issued for said work.

....

(c) The Central Permit Bureau shall not issue, and no other City department or agency shall issue, any permit for construction ... in an Historic District, except in conformity with the provisions of this Article 10. In addition, no such permit shall be issued unless all other applicable laws and regulations have been complied with.

....

(e) After receiving a permit application from the Central Permit Bureau in accordance with the preceding subsection, the [Planning] Department shall ascertain whether Section 1006 requires a Certificate of Appropriateness for the work proposed in such permit application. ... *If such Certificate is required and has not been issued, or if in the sole judgment of the Department the permit application does not conform, the permit application shall be disapproved or held by the Department until such time as conformity does exit; the decision and action of the Department shall be final.*

....

(Planning Code §1005, subs. (a), (c), and (e) (emphasis added).) Section 1006 of the Planning Code, in turn, requires a Certificate of Appropriateness in the case of "[a]ny construction ... for which a City permit is required ... in a historic district." (Planning Code §1006.) Section 1006.2 provides that the Planning Commission shall hold a public hearing on all applications for a Certificate of Appropriateness.

The Amended Petition and exhibits thereto reveal that Appendix L was effective as of April 18, 2003, and that the Planning Department had not completed its review of the application for compliance with the revisions to the Planning Code relating to projects within the Dog Patch Historic District as of December 2005. [See e.g., Amended Petition at Exhs. A-C.]

III. CITY REVIEW OF THE APPLICATION FOR CONSISTENCY WITH APPENDIX L.

Petitioner admits that the reason for bringing the present action is to avoid what Petitioner views as the inequitable requirement that the Project "obtain review and approvals" based on Planning Code provisions adopted during the pendency of the Application [*id.* at ¶ 10], and that the Project be in "compliance with later enacted procedural requirements." [*Id.* at ¶ 12.] The Amended Petition reveals that the Project has not been reviewed for compliance with Article 10 of the Planning Code, Petitioner has not applied for or received the required Certificate of Appropriateness and the 1999 Negative Declaration for the Project has not been reviewed for adequacy in light of the subsequent identification of historic resources and delineation of a new historic district. Instead, Petitioner concedes that between November 14 and December 2, 2005, the Planning Department concluded that it had not completed review of the Project for consistency with the standards set forth in Appendix L, and reasserted jurisdiction over the permit application. [*Id.* at ¶4; see also Exh. A, Exh. B. at ¶5.] Petitioner was notified of this determination by City personnel on December 2, 2005, and again on January 5, 2006. [*Id.* at ¶4 and Exh. A.] On March 6, 2006, the Zoning Administrator (ZA) formally requested that DBI "route any and all building permit applications, renewals, extensions addendums, or revisions for the subject property to the Planning Department for review," [*Id.* at Exh. C], explaining that the "Planning Department will review [the Project application] for consistency with the Planning Code . . . including the adequacy of past environmental reviews . . . and regulations of the Dogpatch Historical District within Article 10 of the code." [*Id.*]

IV. ADMINISTRATIVE APPEALS OF THE PLANNING DEPARTMENT'S ACTION.

A. APPEAL OF THE REASSERTION OF PLANNING DEPARTMENT JURISDICTION TO THE BUILDING INSPECTION COMMISSION.

In January 2006, Petitioner filed an appeal with the BIC challenging the Planning Department's reassertion of jurisdiction over the Application. [*Id.* at ¶ 9.] After a full hearing, the BIC denied the appeal. [*Id.*] Petitioner made a request for rehearing by the BIC, which was also denied. [*Id.*] The BIC adopted its findings supporting the decision and upholding the actions by Planning and DBI staff on May 1, 2006, specifically finding as follows:

The Planning Department acted properly in reasserting its jurisdiction over the permit because, under San Francisco Building Code Section 106.4.3, a building permit issued in violation of the Planning Code – or any City Ordinance – would not be valid. The Planning Department is the City agency charged with determining whether building permits comply with the Planning Code.

....

...DBI's Central Permit Bureau never issued the site permit for the Project. No permit was delivered to the Appellant Carroll or his agent. Sign-offs by various City Departments on Appellant's final plans and other structural details that are needed before a permit can issue are not "issuance" of a permit.

....

Because DBI's Central Permit Bureau did not yet issue a permit to Appellant Carroll, Appellant has no vested right to undertake the Project and DBI has no further jurisdiction pending Planning Department action on the matter.

[*Id.* at Exh. B, p. 2 at ¶6, p. 2-1 at ¶¶ 1-3.] The BIC served its written findings on Petitioner by mail on May 8, 2006. [*Id.* at ¶ 9.]

B. APPEAL OF THE ZA DETERMINATION TO THE BOARD OF APPEALS.

Petitioner appealed the ZA's request that documents relating to the Application be routed directly to the Planning Department to the BOA on March 21, 2006. [*Id.* at ¶22.] The BOA Agenda for the meeting provided notice that Government Code § 65009 would apply to any court challenges of determinations reached in the noticed hearings. [Request for Judicial Notice in Support of Demurrer ("RJN") at Exh. A.] After a hearing on May 17, 2006, the BOA denied the appeal and upheld the ZA determination. [*Id.* at ¶ 24] Petitioner's subsequent request for rehearing was heard and denied on June 14, 2006, and the BOA mailed its Notice of Decision and Order on June 16, 2006. [*Id.* at ¶24] The Notice of Decision and Order included written notice to Petitioner

1 that any court challenges to the BOA's determination would be governed by the statute of
 2 limitations set forth in Code of Civil Procedure §1094.6. [*Id.* at Exh. D, p. 1.]

3 **V. COMMENCEMENT OF THE WRIT ACTION.**

4
 5 Petitioner filed an initial petition in this case on August 4, 2006. [*See* Amended Petition at
 6 p. 1.] That petition was never served on the City. Instead, Petitioner filed its Amended Petition on
 7 September 12, 2006. Summons was issued, and the Amended Petition served on the City through
 8 the Office of the Mayor as required by San Francisco Charter § 3.100, on September 27, 2006. [*See*
 9 RJN at Exh. B.]

10 **ARGUMENT**

11 **I. LEGAL STANDARD.**

12 This Court applies Part Two of the Code of Civil Procedure, including the demurrer rule set
 13 out in C.C.P. § 430.10, to writ actions brought under C.C.P. § 1094.5 (C.C.P. § 1109.) Section
 14 430.10(e) of the Code allows a responding party to demur on grounds that "[t]he pleading does not
 15 state facts sufficient to constitute a cause of action." "In determining if a [petition] is subject to
 16 demurrer, the court considers not only the face of the complaint but any facts judicially noticed."
 17 (*Washington v. County of Contra Costa* (1995) 38 Cal.App.4th 890, 895.) Facts appearing in
 18 exhibits attached to the petition are also accepted as true. (*Dodd v. Citizens Bank of Costa Mesa*
 19 (1990) 222 Cal.App.3d 1624, 1627.) Although the Court assumes the truth of all facts properly
 20 pleaded, it "will not, however, assume the truth of contentions, deductions or conclusions of fact or
 21 law ... and may disregard allegations that are contrary to the law or to a fact of which judicial notice
 22 may be taken." (*Wolfe v. State Farm & Casualty Insurance Co.* (1996) 46 Cal.App.4th 554, 560
 23 [citation omitted].)

24 **II. THE AMENDED PETITION FAILS TO STATE A CLAIM FOR WHICH RELIEF 25 CAN BE GRANTED.**

26 Both claims set forth in the Amended Petition seek relief from compliance with the
 27 requirements of Article 10 generally, and with Appendix L in particular, and from review of
 28 previous environmental analysis under the California Environmental Quality Act ("CEQA") for

adequacy in light of the subsequent identification of historic resources and delineation of a new historic district in the Project area. Petitioner offers the conclusory assertion that its "Application was deemed complete and approved prior to the enactment of Appendix L and not subject to any procedural requirements of Article 10." [Amended Petition at ¶7.] Whether an application is "complete" is not, however, relevant to a determination of which version of the Planning Code applied to Petitioner's Application. Petitioner further asserts that requiring the Project to comply with changes in the Planning Code adopted subsequent to the filing of its Application would "require Petitioner to go through further procedural hoops such as submitting a further application for substantive reviews...." [*Id.* at ¶10.] In other words, Petitioner wishes to avoid filing an application for Certificate of Appropriateness as required by Article 10. Finally, Petitioner objects to an interpretation of the Planning Code that would require Petitioner to "obtain review and approvals for the Project based on all newly adopted ordinances and requirements" adopted between the filing of its Application and issuance of the final permit. [*Id.*] None of these arguments support Petitioner's claims for relief. Rather, the Amended Petition clearly evidences that the Project is subject to the requirements of Article 10 and Appendix L, that the Project has not received a Certificate of Appropriateness, and that this action must therefore be dismissed.

While Petitioner's Application has remained pending for roughly six years, that fact does not excuse Petitioner from the long line of applicable legal authority requiring the Project to comply with a change in law up to (and sometimes even after) the date on which the project permit is issued. Applying the current Planning Code to the Project at issue in this case mandates dismissal of this action for failure to state a claim.

A. Petitioner is Not Entitled to Issuance of A Permit in Violation of the Planning Code.

It is long settled law in this state that building projects must comply with the Planning Code in effect at the time of permit issuance. (*Wells Fargo Bank v. Town of Woodside* (1983) 33 Cal.3d 379; *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110; *Russian Hill Improvement Assoc. v. Board of Permit Appeals* (1967) 66 Cal.2d 34.) This rule extends even to changes in the law adopted *after* initial administrative decision on a permit.

[T]he mere application for a building permit or the submission of plans which comply with the law in existence at the time of such submission do not entitle an applicant to the issuance of the permit if, in the interim between administrative denial of the permit and the appeal from that denial, an ordinance has been enacted which would prohibit the project contemplated.

(*Selby Realty Co.*, 10 Cal.3d at 125.) In fact, "even a permit which [has] achieved administrative finality can be revoked on the basis of a subsequent change in the zoning laws." (*West Coast Advertising v. City and County of San Francisco* (1967), 256 Cal.App.2d 357, 360.) This concept has been specifically applied to the decisions of San Francisco's Board of Appeals (formerly known as the Board of Permit Appeals) which, "in its *de novo* review is bound to apply the zoning ordinances in effect at the time of its final decision, not those in force at the time of preliminary proceedings before any subordinate agency." (*Russian Hill Improvement Assn.*, 66 Cal.3d at 46.) As a result, the Planning Department, the BIC and the BOA were each required to apply the Planning Code, including Article 10 and Appendix L, to the Project at the time of their respective reviews of the Application. If the permit had been issued without the required Certificate of Appropriateness and Planning Commission review, the permit would have been invalid as a matter of law. (S.F. Building Code § 106.4.3; *Land Waste Management*, supra, 222 Cal.App. 3d at 958.)¹

Similarly, reviewing courts must apply the law in existence at the time of their decision, rather than at the time that a permit is issued or denied. (*Wells Fargo Bank*, 33 Cal.3d at 385; *Selby Realty Co.*, 10 Cal.3d at 110.)

It is the prevailing rule that a reviewing court will apply the law in existence at the time of its decision rather than at the time the permit was denied. [cite.] The purpose of this rule is to prevent an appellate court from issuing orders for the construction of improvements contrary to presently existing legislative provisions. [Cite.] Indeed, even after a permit has been issued, it may be revoked by an administrative body on the basis of a subsequent change in the zoning laws unless the permittee has made substantial improvements in good faith reliance on the permit.

¹ Building Code §106.4.3 provides:

The issuance of a permit or approval of plans and specifications shall not be construed to be a permit for, or an approval of, any violation of the provisions of this code or of any other applicable laws and regulations. Permits presuming to give authority to violate or cancel the provisions of this code or other ordinances of the jurisdiction shall not be valid.

(*Selby Realty Co.*, 10 Cal.3d at 110.) Where, as here, no permit has issued, there can be no substantial reliance thereon to shield the Petitioner from the prevailing rule. (*West Coast Advertising v. City and County of San Francisco* (1967), 256 Cal.App.2d 357, 360.) Nor can Petitioner satisfy the only recognized exception to the rule, which is limited to cases where a subsequent ordinance is enacted with the specific purpose of frustrating the developer's plan. (See *Selby Realty Co.*, 10 Cal.3d at 126, fn. 11.) As a result, Petitioner is not entitled to issuance of the permit he seeks as a matter of law.

"As stated in [*Landi v. County of Monterey* (1983) 139 Cal.App.3d 934, 936-937], the grant of a land-use permit or variance is an adjudicatory act, rather than a legislative one. [Citations.] Adjudicatory decisions must be consistent with applicable land-use legislation. [Citations.] Thus, local government entities cannot issue land-use permits that are inconsistent with controlling land-use legislation, as embodied in zoning ordinances and general plans." (*Land Waste Management, supra*, at 957-58.) Instead, "a land-use permit which is inconsistent with existing zoning ordinances can be issued by a responsible administrative entity only after the applicable ordinances have been amended by the legislative process." (*Id.* at 959.) In short, "[u]nder established law, local government agencies are *powerless* to issue land-use permits which are inconsistent with governing legislation." (*Id.* at 959, citing *Orinda Assn. v. Board of Supervisors* (1986) 182 Cal.App.3d 1145, 1161-1162, 1167-1169.) This Court simply cannot grant Petitioner the relief he seeks—issuance of a permit in violation of San Francisco's Planning and Building Codes.

B. Even if the Project Were in Compliance With the Planning Code, Petitioner is Not Entitled to Issuance of a Permit as a Matter of Right.

In support of his claims herein, Petitioner asserts that the refusal of the Central Permit Bureau to issue Petitioner a permit "was in excess of its jurisdiction as DBI had no discretion regarding the delivery of the permit" [Amended Petition at 3:21-23], that Petitioner "had a vested right to delivery of the permit upon compliance with the applicable codes and substantive requirements thereof" [*id.* at 4:8-9], and that "delivery of the permit after it was approved as complying with the substantive requirements of the Building and Planning Codes is a ministerial

act." [*Id.* at 7:16-17.] Petitioner's claims misunderstand the nature of the permitting authority granted to both the Building and Planning Departments of the City.

The discretionary nature of all permits issued by the City is well settled under California law. Section 26 governs issuance of all such permits, including those issued by DBI. (*Guinnane v. San Francisco City Planning Commission* (1989) 209 Cal.App.3d 732, 738 n.4.) That Section provides:

In the granting or denying of any permit, or the revoking or the refusing to revoke any permit, the granting or revoking power may take into consideration the effect of the proposed business or calling upon surrounding property and upon its residents, and inhabitants thereof; and in granting or denying said permit, or revoking or refusing to revoke a permit, may exercise its sound discretion as to whether said permit should be granted, transferred, denied or revoked.

(S.F. Bus. & Tax. Reg. Code § 26.) In 1943, the California Supreme Court held unequivocally that Section 26 grants the City discretion over all permits: "[Section 26] is . . . comprehensive language affecting the issuance of all permits sought under authority of the relevant San Francisco Charter and ordinance provisions [that] in plain terms vests the granting power with a 'sound discretion' generally." (*Lindell Co. v. Board of Permit Appeals* (1943) 23 Cal.2d 303, 311 [emphasis original].) Similarly, the Court of Appeals has repeatedly rejected arguments that the issuance of permits in the City is a ministerial act. In *Guinnane*, the court considered a building permit applicant's contention—identical to the argument advanced here—that his building permit application must be ministerially granted as long as it complied with the City's zoning and building codes. (*Guinnane, supra* 209 Cal.App.3d at 737.) The court found this argument "unsound" and held that no permit issued by the City is ministerial because "the city, acting through the [San Francisco] Planning Commission and the [San Francisco] Board of Permit Appeals, was empowered to exercise discretionary review and to determine that the proposed residential development was unsuitable for the indicated location." (*Id.* at pp. 737, 745.)

As a corollary to this longstanding principle, courts will not compel issuance of a permit that is subject to such discretion. In other words, the courts will not compel a *particular exercise* of discretion, since it

would do violence to the language and history of section 26 for a court to usurp the City's discretion by concluding in advance of administrative review

that, as a matter of law, a particular permit application will not have an adverse effect on the public health, safety or general welfare. Absent the exercise of section 26 administrative discretion, the issue of the limits of the City's section 26 powers over [a project] is not ripe for review.

(*Martin, supra* at 407.) This reasoning is consistent with the general rule that a writ of mandamus cannot be employed to compel a public agency possessing discretionary power to act in a particular manner. (*Lindell, supra*, at 315.) As a result, even if Petitioner could establish that his proposed Project complies in all respects with applicable provisions of the Building and Planning Codes, this Court cannot grant him the relief he seeks. "[W]hile circumventing the planning authorities in the exercise of their section 26 discretion might be viewed as a concession to the shortness of life, it is not one countenanced by the law." (*Martin, supra* at 407.)

III. THE AMENDED PETITION IS TIME BARRED PURSUANT TO GOVERNMENT CODE SECTION 65009.

A. The Building Inspection Commission and Board of Appeals Determinations are Subject to the Statute of Limitations Set Forth in Government Code § 65009

Petitioner seeks peremptory writs overturning decisions by the BIC and the BOA pursuant to Code of Civil Procedure §§ 1085 and 1094.5. [Amended Petition at 1.] The statute of limitations applicable to these claims is set forth in Government Code § 65009, which applies a 90-day limitations period to all claims challenging local planning decisions, Zoning Administrator determinations, and all decisions of the BIC. Thus, under Government Code § 65009(c)(1), Petitioner had 90 days following each of the two challenged decisions to file and serve a petition attacking that decision. Although the BIC adopted its findings on May 1, 2006, and served those findings on Petitioner on May 8, 2006 [Amended Petition at ¶ 9], Petitioner failed to serve its original Petition on the City, filed its Amended Petition on September 12, 2006 (117 days after the BIC determination became final), and first effected service on the City on September 27, 2006 (142 days after the BIC decision became final). [RJN at Exh B.] Similarly, the BOA decision became final when that entity denied Petitioner's request for rehearing on June 14, 2006. (Code of Civ. Proc. §1094.6(b.) The Agenda for the BOA hearing had contained written notice that any court challenge to decisions made at such hearing would be subject to § 65009. [RJN at Exh. A.] Similarly, the Notice of Decision and Order issued by the BOA provided notice that such court challenge must be filed within the statutory period set forth in Code of Civil Procedure §1094.6.

1 Despite these notices, the Amended Petition was not effectively served on the City as required by
 2 the Charter until 105 days after the BOA decision became final.

3 Government Code Section 65009, subdivision (c)(1)(E), provides that the 90-day statute of
 4 limitations applies to actions seeking "[t]o attack, review, set aside, void or annul any decision on
 5 the matters listed in Sections 65901 and 65903, or to determine the reasonableness, legality, or
 6 validity of any condition attached to a variance, conditional use permit, or any other permit."
 7 Subdivision (c)(1)(F) similarly imposes a 90-day limitations period on "any of the proceedings,
 8 acts, or determinations taken, done, or made prior to any of the decisions listed in [subparagraph
 9 (E).]" Section 65901, in turn, applies to determinations by the City's Zoning Administrator (Gov't
 10 Code § 65901), and §65903 applies to determinations by the City's Board of Appeals. (Gov't Code
 11 §65903.) After the expiration of this time period, "all persons are barred from any further action or
 12 proceeding." (Gov't Code § 65009(e); *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 765.)

13 **B. Limitations Statutes On Actions Challenging Local Planning Decisions Are**
 14 **Strictly Construed.**

15 The purpose of Government Code § 65009 is "to provide certainty for property owners and
 16 local governments regarding decisions made pursuant to this division." (Gov't Code § 65009(a)(3).)
 17 A central aim of the Legislature in adopting § 65009 was to allow "governmental zoning decisions
 18 ... to take effect quickly." (*Ching v. San Francisco Bd. of Permit Appeals* (1998) 60 Cal.App.4th
 19 888, 893; cf. *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 7.) As the *Ching* court explained, the
 20 90-day statute of limitations was enacted "to ensure that the validity of local public agency
 21 decisions would be judicially determined as expeditiously as possible because any delay ... is
 22 ultimately reflected in increased costs to the public." (*Ching, supra*, 60 Cal. App. 4th at 893.) By
 23 enacting this short limitations period, the Legislature intended "to provide certainty for property
 24 owners and local governments regarding [local zoning and planning decisions]." (Gov't Code §
 25 65009 (a)(3).) In light of these policies, courts have held that the time limits of § 65009 are to be
 26 strictly construed. (*Wagner v. City of South Pasadena* (2000) 78 Cal.App.4th 943, 950 [emphasis
 27 added] [quoting *Maginn v. City of Glendale* (1999) 72 Cal.App.4th 1102, 1109].) Thus, "[T]he
 28 courts have consistently enforced the 90-day limit." (*Ching, supra*, 60 Cal.App.4th at 893.)

1 Even a minor extension of § 65009's 90-day limitations period would impermissibly
2 undermine the statute's purpose of providing certainty for local government decisions. Thus, in
3 *Wagner, supra*, 78 Cal.App.4th 943, the Court of Appeal held that the five-day extension of time for
4 mail service found in Code of Civil Procedure § 1013(a) should not be applied to extend the time
5 for service of an action on a local government body under § 65009(c)(1). This was so in part
6 because even a five-day extension would have undermined "the ends of certainty and promptitude"
7 embodied by the 90-day limit. (*Wagner, supra*, 78 Cal.App.4th at 949.)

8 In this case, Petitioner filed its initial Petition on the City within 90 days of the BIC's
9 determination, but *never served that Petition on the City*. Petitioner then filed its Amended Petition
10 on the 117th day after the BIC decision became final, and on the 90th day after the BOA decision
11 became final. Petitioner finally served the Mayor's Office with summons and the Amended Petition
12 on September 27—142 days after the BIC decision became final, and 105 days after the BOA
13 decision became final. As a result, the Court should sustain the City's demurrer and, because
14 Petitioner cannot amend its Petition to demonstrate compliance with § 65009, Petitioner should not
15 be granted leave to amend. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [if there is no reasonable
16 probability a pleading defect can be cured by amendment, leave to amend should not be granted].)

18 CONCLUSION

19 For the foregoing reasons, the allegations of the Amended Petition including exhibits thereto,
20 and those facts of which this Court may take judicial notice, show that the claims for relief set forth in
21 the Amended Petition are untimely as a matter of law, and fail to state facts sufficient to constitute a
22 cause of action. On that basis, the City respectfully submits that its demurrer should be sustained
23 without leave to amend as to both claims for relief set forth in the Amended Petition.

1 Dated: May 9, 2007

2 DENNIS J. HERRERA
3 City Attorney
4 KRISTEN A. JENSEN
5 THOMAS LAKRITZ
6 CHRISTINE VAN AKEN
7 Deputy City Attorneys

8 By: 

9 KRISTEN A. JENSEN

10 Attorneys for Defendant
11 CITY AND COUNTY OF SAN FRANCISCO
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PROOF OF SERVICE

I, REYNA LOPEZ, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, Room 234, San Francisco, CA 94102.

On May 9, 2007, I served the following document(s):

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO
AMENDED PETITION FOR WRIT OF MANDATE AND ADMINISTRATIVE
MANDAMUS**

on the following persons at the locations specified:

Margaret A. Seltzer, Esq.
Seltzer Law Group
425 California Street, Nineteenth Floor
San Francisco, CA 94104-2296

in the manner indicated below:

☒ **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☐ **BY OVERNIGHT DELIVERY:** I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and delivery by overnight courier service. I am readily familiar with the practices of the San Francisco City Attorney's Office for sending overnight deliveries. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be collected by a courier the same day.

☐ **BY FACSIMILE:** Based on a written agreement of the parties to accept service by fax, I transmitted true and correct copies of the above document(s) via a facsimile machine at telephone number (415) 554-4757 to the persons and the fax numbers listed above. The fax transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine, and a copy of the transmission report ☐ is attached or ☐ will be filed separately with the court.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed May 9, 2007, at San Francisco, California.


REYNA LOPEZ

Exhibit 9

DENNIS J. HERRERA, State Bar #139669
City Attorney
KRISTEN A. JENSEN, State Bar #130196
THOMAS S. LAKRITZ, State Bar #161234
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ENDORSED
FILED
San Francisco County Superior Court

JUL 3 2007

GORDON PARK-LI, Clerk
BY BERNADETTE THOMPSON
Deputy Clerk

Attorneys for Respondent
CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION

TRUST OF REGAN CARROLL,
REGAN CARROLL, TRUSTEE

Petitioner,

vs.

CITY AND COUNTY OF SAN
FRANCISCO DEPARTMENT OF
BUILDING INSPECTION, CITY AND
COUNTY OF SAN FRANCISCO
BUILDING INSPECTION
COMMISSION, CITY AND COUNTY
OF SAN FRANCISCO PLANNING
DEPARTMENT, CITY AND COUNTY
OF SAN FRANCISCO BOARD OF
APPEALS,

Respondents.

Case No. CPF-06-506542

REPLY MEMORANDUM IN
SUPPORT OF DEMURRER TO
AMENDED PETITION FOR WRIT OF
MANDATE AND ADMINISTRATIVE
MANDAMUS

Hearing Date: July 11, 2007
Hearing Judge: Hon. Patrick J. Mahoney
Time: 9:30 a.m.
Place: Dept. 302

Date Action Filed: September 12, 2006
Trial Date: None Assigned

Respondent City submits this reply memorandum in support of its demurrer to the Amended Petition for Writ of Mandate (etc.) ("Amended Petition"), filed herein on September 12, 2006.

INTRODUCTION

Petitioner's Opposition to Demurrer (etc.) ("Opposition") responds to the City's arguments with a mixture of misstated facts, and a failure to address the fundamental legal defect that infects the entire Amended Petition. First, the Opposition repeatedly suggests that the City had already "issued" the building permit for Petitioner's Project, then "snatched" it back when the Planning Department determined that the Project did not comply with Article 10 and Appendix L of the Planning Code related to building requirements in the Dogpatch Historic District. [See generally Opposition at 1-2.] The Amended Petition itself reveals the fallacy of this assertion. Specifically, the exhibits to the Amended Petition clearly demonstrate that no permit was ever issued for the Project. [Id. at Exh. B.] More revealing, however, is the Petitioner's failure to address head on the fundamental legal flaw underlying each of the theories articulated in the Amended Petition: the permit Petitioner seeks would violate the Planning Code, and thus its issuance cannot be compelled by this Court under any theory.

Petitioner never refutes the City's premise that: "Under established law local government agencies are *powerless* to issue land-use permits which are inconsistent with governing legislation." (*Land Waste Management v. Contra Costa Board of Supervisors* (1990) 222 Cal.App.3d 950, 959 (italics in original).) This rule extends to the courts, which leads to the well-settled principle of administrative law that, until a permit is finally granted, the Building and Planning Departments, and all administrative agencies and courts considering a permit application, must apply the Planning Code in effect at the time of review. Petitioner never addresses the fact that his entire Amended Petition is resolved by reference to the line of cases including *Russian Hill Imp. Ass'n v. Board of Permit Appeals of City and County of San Francisco* (1967) 66 Cal.2d 34, 40.

For the reasons set forth herein, the Amended Petition must be dismissed without leave to amend.

ARGUMENT

I. THE AMENDED PETITION IS TIME-BARRED PURSUANT TO GOVERNMENT CODE SECTION 65009.

Contrary to Petitioner's assertions, both of the causes of action set forth in the Amended Petition are barred by the statute of limitations set forth in Government Code §65009. The first cause of action challenges a decision by the City's Building Inspection Commission ("BIC"), which concluded that the Planning Department had properly reasserted jurisdiction over the Application prior to issuance of the building permit in order to review the Project for consistency with provisions of the Planning Code adopted and effective in 2003. The BIC specifically determined that the permit had not issued at the time that the Planning Department reasserted jurisdiction to review the Project for conformity with the Planning Code. [Amended Complaint at Exh. B, Finding 1.] The BIC determination effectively conditioned issuance of the Project permit on compliance with the Planning Code and all other applicable law, as is required by San Francisco Building Code § 106.4.3. The second cause of action challenges a decision by the San Francisco Board of Appeals ("BOA") upholding the Zoning Administrator's request that the Department of Building Inspection ("DBI") route all future permits and correspondence to the Planning Department, and notification of the Petitioner that the Project would be reviewed for consistency with Planning Code provisions relating to the Dogpatch Historic District. Both of the challenged City actions stem from the City's application of Planning Code Section 312, Article 10 and Appendix L to the Project.

A. The First Cause of Action is Governed by the Statute of Limitations Set Forth in Government Code § 65009.

Petitioner's Opposition Brief suggests that the first cause of action set forth in the Amended Petition is not subject to the statute of limitations set forth in Government Code §65009 because, the argument goes, "this is not a 1094.5 writ challenging the merits of an administrative decision" but rather "a 1085 writ that challenges the unlawful and irregular conduct of a City employee who acted without authority." [Opposition at 2:2-5.] In other words, Petitioner attempts to recast the claims set forth in the first cause of action as merely a claim to enforce a ministerial duty of the City. This attempt fails for several reasons. First, the allegations of the Amended Petition make clear that the first cause of action includes a challenge to the refusal of DBI to issue a building permit *as upheld*

1 by the Building Inspection Commission's decision. [Amended Petition at ¶¶ 6, 7, 9, 10, 12, 14 and
 2 Exhs. A, B.] This is precisely the "challenge to the merits of an administrative decision" that
 3 Petitioner now disclaims in the Opposition. Second, as demonstrated in the City's Memorandum in
 4 Support of this Demurrer and as discussed further in Section II.B, below, issuance of building
 5 permits is simply not a ministerial act for which relief under Section 1085 is available. Finally,
 6 whether the first cause of action seeks relief pursuant to Section 1085 or Section 1094.5 of the Code
 7 of Civil Procedure is irrelevant for purposes of the statute of limitations imposed by Government
 8 Code §65009. Rather, as noted by Petitioner, citing to *Honig v. City and County of San Francisco*
 9 (2005) 127 Cal.App.4th 520), courts must look beneath the surface of a claim to determine whether,
 10 at base, it is a challenge to the City's planning and zoning decisions. In this case, the gravamen of
 11 the first cause of action is clearly a challenge to DBI's determination not to issue a building permit
 12 because the Planning Department had determined that it did not comply with applicable provisions
 13 of the Planning Code. This claim falls squarely within the limitations provisions of Government
 14 Code §65009.

15 Government Code Section 65009, subdivision (c)(1)(E), provides that the 90-day statute of
 16 limitations applies to actions seeking "[t]o attack, review, set aside, void or annul any decision on
 17 the matters listed in Sections 65901 and 65903, or to determine the reasonableness, legality, or
 18 validity of any condition attached to a variance, conditional use permit, or any other permit."
 19 Subdivision (c)(1)(F) similarly imposes a 90-day limitations period on "any of the proceedings,
 20 acts, or determinations taken, done, or made prior to any of the decisions listed in [subparagraph
 21 (E).]" In this case, Petitioner objects because the City has refused to issue a building permit that
 22 does not comply with the provisions of the Planning Code relating to the Dogpatch Historic District.
 23 In other words, DBI conditioned issuance of the requested building permit on compliance with the
 24 Planning Code.

25 As discussed at length in *Honig v. City and County of San Francisco*,

26 The short limitations period provided by Government Code section 65009,
 27 subdivision (c) serves the important legislative purpose of permitting the
 28 rapid resolution of legal challenges to local zoning and planning decisions.
 [citation].

(172 Cal.App.4th at 528 (citing *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 774)(emphasis added).) In that case, the petitioner challenged the City's issuance of a building permit, and the City argued that the claim was time-barred by § 65009. Petitioner countered that issuance of a building permit is not one of the matters listed in § 65009, and therefore the limitations period provided in that section was not applicable. The Court of Appeal disagreed, holding that the petitioner's challenge to the building permit was, in effect a, challenge to the underlying variance that was governed by the 90-day limitations period provided by §65009. (172 Cal.App.4th at 528-29.)

In the present case, Petitioner's first cause of action challenges the BIC decision upholding DBI's determination that the Planning Department had properly reasserted jurisdiction over the Application because the Project did not comply with the Planning Code sections applicable to construction in the Dogpatch Historic District. [Amended Petition at ¶¶ 6, 7, 9, 10, 12, 14, and Exhs. A, B.] That determination is a "local planning decision" subject to §65009. Because Petitioner failed to serve its original Petition on the City, filed its Amended Petition on September 12, 2006 (117 days after the BIC determination became final), and first effected service on the City on September 27, 2006 (142 days after the BIC decision became final), the first cause of action is time-barred. [RJN at Exh. B.]

B. The Second Cause of Action is Governed by the Statute of Limitations Set Forth in Government Code § 65009.

Petitioner concedes that the second cause of action, challenging a determination by the Board of Appeals, is subject to the time limitations set forth in §65009. [E.g., Opposition at 4:4.] This is because §65009, by incorporating §§ 65901 and 65903, clearly governs challenges to both determinations by the Zoning Administrator and decisions of the City's Board of Appeals. (See Gov't Code § 65901; §65903 .) After the expiration of this time period, "all persons are barred from any further action or proceeding." (Gov't Code § 65009(e); *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 765.) Instead, Petitioner takes issue with the service requirements applicable in this case. Petitioner misstates the relationship between the City and its subordinate boards, commissions and departments and, therefore, misconceives the requirements for serving the City with process.

1 The City's Charter reflects that the Department of Building Inspection, the Building
 2 Inspection Commission, the Zoning Administrator and the Board of Appeals are subsidiary or
 3 subordinate entities within the City, rather than independent of the City. (*See, e.g.*, Charter § 4.106
 4 (Board of Appeals); § 4.121 (Building Inspection Commission).) While the Charter provides that
 5 the City and County "may appear, sue and defend in all courts in all matters and proceedings," there
 6 is no Charter provision providing these subordinate entities with the right to sue or be sued. Only
 7 the Mayor, in turn, is designated in the Charter to accept service of process on behalf of the City.
 8 (Charter § 3.100.)

9 Petitioner cites to two cases that are inapposite, and do not support his claim. The first,
 10 *Crumpler v. Board of Admin. Employees' Retirement System* (1973) 32 Cal.App.3d 567, involved a
 11 claim against a board that was apparently not a subsidiary of the city that employed the plaintiffs.
 12 "That proceeding being one for judicial review of the administrative decision of the board
 13 approving reclassification of petitioners, the board was the only necessary and proper party." (*Id.* at
 14 575.) Similarly, the *Guillemin* case cited in the Opposition is inapposite. In that case, the court
 15 recited multiple definitions of "public entity" to illustrate that the term is defined *differently in*
 16 *different statutory contexts* within the Government Code. "Public agency" is a term that can be
 17 reasonably interpreted to include a variety of public litigants. And the Legislature has defined
 18 public agency differently in Government Code statutes as a means of delineating the intended
 19 coverage of the statute. (Cf. §§ 6500 [joint powers agreements], FN6 31478 [county employees
 20 retirement law], FN7 53101 [local emergency telephone systems].) (*Guillemin v. Stein* (2002) 104
 21 Cal.App.4th 156, 165 fn. 7.) None of the code sections referenced in that case applies to the present
 22 action.

23 In this case, the proof of service demonstrates that the Amended Petition was served in
 24 compliance with the Charter on September 27, 2006. The BOA decision became final when that
 25 entity denied Petitioner's request for rehearing on June 14, 2006. (Code of Civ. Proc. § 1094.6(b).
 26 Through the Agenda for the BOA hearing and the Notice of Decision and Order issued after the
 27 hearing, Petitioner was put on notice that any court challenge to decisions made at such hearing
 28 would be subject to § 65009. [RJN at Exh. A.] Nonetheless, the Amended Petition was not

effectively served on the City as required by the Charter until 105 days after the BOA decision became final. As a result, the second cause of action is also time-barred.

II. THE RELIEF SOUGHT BY THE AMENDED PETITION IS NOT AVAILABLE AS A MATTER OF LAW.

A. This Court Must Review the Permit Application in Light of Article 10 and Appendix L of the City's Planning Code.

"It is the 'prevailing rule[]' ... that, when an application for a building complied with the requirements in effect when it was filed, but in the interim between the application and the appeal from its denial, a new ordinance is enacted which would prohibit the development, 'a reviewing court will apply the law in existence at the time of its decision rather than at the time the permit was denied.' [Citation.] The purpose of the rule is to prevent an appellate court from issuing orders for the construction of improvements contrary to presently existing legislative provisions." (*Wells Fargo Bank v. Town of Woodside* (1983) 33 Cal.3d 379, 385 at fn.7 (citing *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 125).) "The only recognized exception to this rule applies to cases where a subsequent ordinance is enacted with the purpose of frustrating the developer's plans." (*Id.* (citing *Selby Realty* at p. 126, fn. 11; *Atlantic Richfield Co. v. Board of Supervisors* (1974) 40 Cal.App.3d 1059, 1063-1065).)

Petitioner does not assert that Article 10 of the Planning Code was adopted in 2003 for the purpose of frustrating *his Project*. Nor could he. Since Article 10 of the Planning Code remains in force today, this Court is bound to review the Application (and the relief requested in the Amended Petition) in light of the requirements set forth in that article, including the requirement that the Project obtain a Certificate of Appropriateness. (Planning Code § 1006.) Since the Amended Petition reveals, and Petitioner's Opposition admits, that the Project has not obtained a Certificate of Appropriateness [Amended Petition at ¶10, Exh. C; Opposition at 5:12-15], the Court must sustain the City's Demurrer without leave to amend.

Similarly, Petitioner does not challenge the "prevailing rule," nor does he suggest that the building permit he seeks would comply with Section 1006 of the Planning Code, or with Article 10, Appendix L of that Code. Rather he concedes, as he must, that the law even permits revocation of issued permits based on subsequent changes to the Planning Code. [Opposition at 4:22-26.] He also

1 concedes again that he has not obtained the Certificate of Appropriateness required by the Planning
 2 Code for all construction in the City's historic districts. [Opposition at 12-13.] Nonetheless he
 3 argues that in this case, "the proper administrative body did not revoke the permit" and, in any
 4 event, that he is entitled to an exemption from this rule because he has made substantial
 5 improvements in good faith reliance on the permit. [Opposition at 4:27-5:3.] Finally, he argues—
 6 without citation to authority—that Planning Code Section 1006, Article 10 and Appendix L are not
 7 "a zoning ordinance." [Opposition at 12-14.] These arguments miss the mark in every respect.

8 As to Petitioner's first argument, the Amended Petition and its exhibits reveal that no permit
 9 was ever issued for his Project. [Amended Petition at Exh. C, Finding 1.] As a consequence, such
 10 permit has not been "revoked" by the Planning Department.

11 Second, the law is clear that the "vested rights" exception that Petitioner hopes to rely on
 12 does not apply where *no permit has issued*. Rather, where no permit has issued, there can be no
 13 substantial reliance to shield the Petitioner from the prevailing rule. (*West Coast Advertising v. City*
 14 *and County of San Francisco* (1967) 256 Cal.App.2d 357, 360.)

15 Finally, Petitioner's third and most confusing argument—that the Planning Code Sections
 16 governing construction in historic districts generally, and the Dogpatch Historic District in
 17 particular, are not "zoning ordinance[s]"—also fails. Article 10 of the Planning Code regulates the
 18 uses that may be made of sites located within designated historic districts. [See, e.g., Planning Code
 19 §§ 1001, 1005, 1006.] Any project proposed for such a site that has not obtained a Certificate of
 20 Appropriateness may not be constructed in the District. [Planning Code §1005.] The fact that
 21 restrictions placed on construction in such districts are focused on the historic character of existing
 22 structures within the designated districts—or what Petitioner refers to as "aesthetics"—does not
 23 render those requirements elective. Article 10 was adopted to further the following goals:

24 It is hereby found that structures, sites and areas of special character or
 25 special historical, architectural or aesthetic interest or value have been and
 26 continue to be unnecessarily destroyed or impaired, despite the feasibility of
 27 preserving them. It is further found that the prevention of such needless
 destruction and impairment is essential to the health, safety and general
 welfare of the public. The purpose of this legislation is to promote the health,
 safety and general welfare of the public....

(Planning Code §1001.) Such goals are recognized to be well within the reach of the government's zoning authority and, in fact, the United States Supreme Court has found that

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

(*Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 6.)

Nor does Petitioner's citation to the case of *Martin v. City and County of San Francisco* aid in his cause. Petitioner cites the *Martin* case for the proposition that Article 10 of the Planning Code does not regulate the interiors of structures in designated historic districts. [Opposition at 5:21-22.] But Petitioner offers no insight into the relevance of that observation. No citation to case law is offered to suggest that planning, zoning and land use regulations aimed at preserving the historic character of neighborhoods are somehow excluded from the "prevailing rule" articulated above. Nor is the City aware of any case supporting such a counter-intuitive proposition. Similarly, the bald assertion that "zoning laws regulate the interior of proposed structures, not just the facades" is also unsupported and insupportable. Rather than bolstering these assertions, the *Martin* court explained emphatically that "[w]ithout question, the preservation of San Francisco's architectural history is an important policy goal," a goal that is expressly addressed by Article 10.

(*Martin v. City and County of San Francisco* (2005) 135 Cal.App.4th 392, 405.)

B. Issuance of Building Permits is a Discretionary Act Not Susceptible to Relief Pursuant to Code of Civil Procedure §1085.

Petitioner's Opposition concedes that Section 26 of the Business & Taxation Regulation Code gives the City discretion to issue or deny building permits. [Opposition at 6:2-3.] The Opposition then suggests, without supporting facts or law, that refusal to issue a permit until Planning Department review for compliance with applicable sections of the City's Landmark

1 Preservation ordinances is an abuse of that discretion. As noted above and in the City's moving
 2 papers, the broad provisions of §26 prohibit this Court from granting the relief sought in the
 3 Amended Petition.

4 In particular, writ relief pursuant to Code of Civil Procedure §1085 is not available to
 5 compel the City to perform a discretionary act. A traditional writ of mandate under §1085 is
 6 available to compel the respondent to perform a *ministerial duty* in cases where the petitioner has a
 7 clear, present and beneficial right to performance. (*Conlan v. Bonta* (2002) 102 Cal.App.4th 745,
 8 748; *Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 618.) Plaintiff cannot
 9 allege that the City has a ministerial duty to issue, deny or rescind a building permit. Rather, the
 10 case law makes clear that issuance of building permits in the City is a discretionary—not a
 11 ministerial—act. Plaintiff's claim for relief pursuant to Code of Civil Procedure §1085 must
 12 therefore fail as a matter of law.

13 The discretionary nature of all permits issued by the City is well settled under
 14 California law, and is discussed at length in the City's moving papers. [See Memorandum in
 15 Support at 10:21-12:9.] Absent the exercise of the City's discretion (that is, before a decision has
 16 been made whether to issue or deny a permit), Code of Civil Procedure §1094.5 similarly does not
 17 provide Petitioner with a vehicle for the relief sought in this case. Simply put, courts will not
 18 compel issuance, denial or rescission of a permit that is subject to such discretion. In other words,
 19 the courts will not compel a *particular exercise* of discretion, since it
 20 would do violence to the language and history of section 26 for a court to
 21 usurp the City's discretion by concluding in advance of administrative review
 22 that, as a matter of law, a particular permit application will not have an
 23 adverse effect on the public health, safety or general welfare.

24 (*Martin* at 407.) This reasoning is consistent with the general rule that a writ of mandamus cannot
 25 be employed to compel a public agency possessing discretionary power to act in a particular
 manner. (*Lindell, supra*, at 315.) "[W]hile circumventing the planning authorities in the exercise of
 their section 26 discretion might be viewed as a concession to the shortness of life, it is not one
 countenanced by the law." (*Martin, supra* at 407.)

1 The Amended Petition discloses that the City had not issued or denied the requested
 2 building permit at the time the BOA and BIC decisions were rendered. This Court is simply not
 3 empowered to exercise the discretion vested in the City and order that the permit be issued.

4 **III. PETITIONER SHOULD BE DENIED LEAVE TO AMEND.**

5 Petitioner has offered the Court no basis on which to grant leave to amend, and therefore the
 6 Demurrer should be denied without leave. The only additional "facts" offered by Petitioner go to
 7 the issue of whether Petitioner has expended substantial sums in reliance on the permit for his
 8 Project. [Opposition at 5:1-3.] Such "facts," however, would not save the Amended Petition even if
 9 true. This is because the Amended Petition clearly reveals that *no permit was issued* in this case.
 10 Where no permit has issued, the "vested rights" exception set forth in *Selby Realty*, cited above,
 11 cannot apply.

12 **CONCLUSION**

13 For the foregoing reasons and those set forth in the City's moving papers, the allegations of
 14 the Amended Petition including exhibits thereto, and those facts of which this Court may take judicial
 15 notice, show that the claims for relief set forth in the Amended Petition are untimely as a matter of
 16 law, and fail to state facts sufficient to constitute a cause of action. On that basis, the City
 17 respectfully submits that its demurrer should be sustained without leave to amend as to both claims
 18 for relief set forth in the Amended Petition.

19 Dated: July 3, 2007

20 DENNIS J. HERRERA
 21 City Attorney
 22 KRISTEN A. JENSEN
 23 THOMAS LAKRITZ
 24 CHRISTINE VAN AKEN
 Deputy City Attorneys

By: 

KRISTEN A. JENSEN

Attorneys for Defendant
 CITY AND COUNTY OF SAN FRANCISCO

PROOF OF SERVICE

I, REYNA LOPEZ, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, Room 234, San Francisco, CA 94102.

On July 3, 2007, I served the following document(s):

**REPLY MEMORANDUM IN SUPPORT OF DEMURRER TO AMENDED PETITION
FOR WRIT OF MANDATE AND ADMINISTRATIVE MANDAMUS**

on the following persons at the locations specified:

Andrew M. Zacks, Esq.
ZACKS UTRECHT & LEADBETTER, PC
235 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: (415) 956-8100

in the manner indicated below:

☒ **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☐ **BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional messenger service. A declaration from the messenger who made the delivery ☐ is attached or ☐ will be filed separately with the court. (Susan Zemsky, Esq.)

☐ **BY OVERNIGHT DELIVERY:** I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and delivery by overnight courier service. I am readily familiar with the practices of the San Francisco City Attorney's Office for sending overnight deliveries. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be collected by a courier the same day.

☐ **BY FACSIMILE:** Based on a written agreement of the parties to accept service by fax, I transmitted true and correct copies of the above document(s) via a facsimile machine at telephone number (415) 554-4757 to the persons and the fax numbers listed above. The fax transmission was reported as complete and without error. The transmission report was properly issued by the transmitting facsimile machine, and a copy of the transmission report ☐ is attached or ☐ will be filed separately with the court.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed July 3, 2007, at San Francisco, California.


REYNA LOPEZ

Exhibit 10

CIV-110

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name and Address): James B. Kraus, SBN 184118 Zacks, Utrecht & Leadbetter, PC 235 Montgomery Street, Suite 400 San Francisco, CA 94104		TELEPHONE NO.: 415-956-8100	FOR COURT USE ONLY
ATTORNEY FOR (Name): Plaintiff Regan Carroll Trust Insert name of court and name of judicial district and branch court, if any: San Francisco Superior Court Unlimited Civil Jurisdiction			
PLAINTIFF/PETITIONER: Regan Carroll Trust, Regan Carroll, trustee, DEFENDANT/RESPONDENT: City and County of San Francisco, San Francisco Board of Appeals,			
REQUEST FOR DISMISSAL <input type="checkbox"/> Personal Injury, Property Damage, or Wrongful Death <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other <input type="checkbox"/> Family Law <input type="checkbox"/> Eminent Domain <input checked="" type="checkbox"/> Other (specify): Petition for Writ of Mandate		CASE NUMBER: 506542	

- A conformed copy will not be returned by the clerk unless a method of return is provided with the document. -

1. TO THE CLERK: Please dismiss this action as follows:

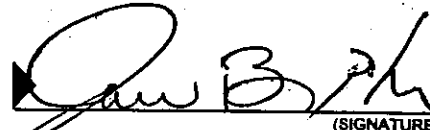
- a. (1) ☐ With prejudice (2) ☒ Without prejudice
- b. (1) ☒ Complaint (2) ☒ Petition
 (3) ☐ Cross-complaint filed by (name):
 (4) ☐ Cross-complaint filed by (name):
 (5) ☐ Entire action of all parties and all causes of action
 (6) ☐ Other (specify):*

on (date):

on (date):

Date: 07/05/07

James B. Kraus, SBN 184118

(TYPE OR PRINT NAME OF ☒ ATTORNEY ☐ PARTY WITHOUT ATTORNEY)


(SIGNATURE)

Attorney or party without attorney for:

* If dismissal requested is of specified parties only of specified causes of action only, or of specified cross-complaints only, so state and identify the parties, causes of action, or cross-complaints to be dismissed.

- ☐ Plaintiff/Petitioner ☐ Defendant/Respondent
☐ Cross - complainant

2. TO THE CLERK: Consent to the above dismissal is hereby given.**

Date:

(TYPE OR PRINT NAME OF ☐ ATTORNEY ☐ PARTY WITHOUT ATTORNEY)

(SIGNATURE)

Attorney or party without attorney for:

** If a cross-complaint or Response (Family Law) seeking affirmative relief is on file, the attorney for cross-complainant (respondent) must sign this consent consent if required by Code of Civil Procedure section 581(i) or (j).

- ☐ Plaintiff/Petitioner ☐ Defendant/Respondent
☐ Cross - complainant

(To be completed by clerk)

3. ☐ Dismissal entered as requested on (date):
 4. ☐ Dismissal entered on (date): as to only (name):
 5. ☐ Dismissal not entered as requested for the following reasons (specify):

- ☐ a. Attorney or party without attorney notified on (date):
 b. Attorney or party without attorney not notified. Filing party failed to provide
☐ a copy to conform ☐ means to return conformed copy

Clerk, by _____, Deputy

POS-040

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Andrew M. Zacks (SBN 147794) Zacks, Utrecht & Leadbetter, PC 235 Montgomery Street, Suite 400 San Francisco, CA 94104 TELEPHONE NO.: 415-956-8100 FAX NO. (Optional): E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Trust of Regan Carroll		FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Francisco STREET ADDRESS: 400 McAllister Street MAILING ADDRESS: CITY AND ZIP CODE: San Francisco, CA 94102 BRANCH NAME: Unlimited Civil Jurisdiction		
PETITIONER/PLAINTIFF: Trust of Regan Carroll, Regan Carroll Trustee RESPONDENT/DEFENDANT: City and County of San Francisco, et al.		CASE NUMBER: 506542
PROOF OF SERVICE—CIVIL Check method of service (only one): <input type="checkbox"/> By Personal Service <input checked="" type="checkbox"/> By Mail <input type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By Messenger Service <input type="checkbox"/> By Facsimile <input type="checkbox"/> By E-Mail/Electronic Transmission		JUDGE: DEPT.:

(Do not use this Proof of Service to show service of a Summons and Complaint.)

1. At the time of service I was over 18 years of age and not a party to this action.

2. My address is (specify one):

a. ☒ Business: 235 Montgomery St. Suite 400 b. ☐ Residence:
San Francisco, CA 94104

3. On (date): 07/05/07

I served the following documents (specify): Request for Dismissal

☐ The documents are listed in the Attachment to Proof of Service—Civil (Documents Served) (form POS-040(D)).

4. I served the documents on the persons below, as follows:

a. Name of person served: Kristin Jensen, Esq.

b. Address of person served: City Attorneys Office, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102

c. Fax number or e-mail address of person served, if service was by fax or e-mail:

d. Time of service, if personal service was used:

☐ The names, addresses, and other applicable information about the persons served is on the Attachment to Proof of Service—Civil (Persons Served) (form POS-040(P)).

The documents were served by the following means (specify):

☐ By personal service. I personally delivered the documents to the persons at the addresses listed in item 4.
 (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

CASE NAME Trust of Regan Carroll v. CCSF

CASE NUMBER:
506542

5 b. ☒ By United States mail, I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 4 and (specify one):

- (1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
- (2) ☒ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

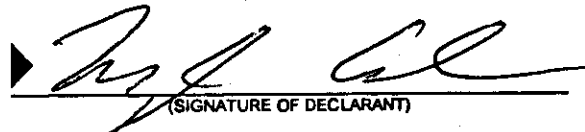
I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at (city and state):

- c. ☐ By overnight delivery, I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 4. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.
- d. ☐ By messenger service, I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 4 and providing them to a professional messenger service for service. (A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.)
- e. ☐ By fax transmission. Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 4. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.
- f. ☐ By e-mail or electronic transmission. Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed in item 4. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 07/05/07

Ingrid M. Karlsson
(TYPE OR PRINT NAME OF DECLARANT)


(SIGNATURE OF DECLARANT)

(If item 5d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

DECLARATION OF MESSENGER

- ☐ By personal service, I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 4. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package, which was clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

I served the envelope or package, as stated above, on (date):

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)

Exhibit 11

2001 SAN FRANCISCO BUILDING CODE

106.4.1.3.2 – 106.4.3

structures or (2) alterations that involve a substantial increase in the envelope of an existing building or structure, to be peer reviewed for structural integrity and effect on hillside stability. The requirements herein for projects in the Northwest Mt. Sutro Slope Protection Area are in addition to all other applicable laws and regulations, including any and all requirements for environmental review under the California Environmental Quality Act; compliance with the requirements contained herein does not excuse a project sponsor from compliance with any other applicable laws and regulations.

106.4.1.3.3 Mandatory review by Structural Advisory Committee and other City officials. All permit applications submitted to the Central Permit Bureau for construction of new buildings or structures or alterations that involve a substantial increase in the envelope of an existing building or structure (as determined by the Director) within the Northwest Mt. Sutro Slope Protection Area shall be submitted to and reviewed by the Structural Advisory Committee, as defined by Building Code Section 105.6. No permits for such properties located within the Northwest Mt. Sutro Slope Protection Area shall be issued unless and until the Director has consulted with and received a written communication from representatives of the Department of Planning, Department of Public Works and Fire Department, each of whom has made a visit to the site for which the project is proposed, and the Director has received a written report from the Structural Advisory Committee concerning the safety and integrity of the proposed design and construction. As part of its review, the Structural Advisory Committee shall consider the effect that construction activity related to the proposed project will have on the safety and stability of the Northwest Mt. Sutro Slope Protection Area.

106.4.1.3.4 Mandatory denial by Director. In the event that the Structural Advisory Committee determines that there is a reasonable likelihood that the proposed design and construction would result in unsafe conditions or would increase the

likelihood of hillside instability, and such unsafe conditions or instability cannot be mitigated to the satisfaction of the Structural Advisory Committee, the Director shall deny the permit. The Director's decision to deny the permit is appealable only to the Board of Appeals.

Section 106.4.2. Replace this section with the following:

106.4.2 Retention of approved construction documents. One set of approved construction documents shall be provided to the party obtaining the permit. The owner shall be responsible for keeping these documents on the building site at all times and making them available for inspection and use by the inspector during such construction until final inspection has been made; failure to do so shall result in stoppage of work. The approved construction documents shall not be changed, modified or altered without authorization from the Director; all work shall be done in accordance with these documents.

One set of approved construction documents for all building permits shall be retained by the Department in reproducible form as public records.

Section 106.4.3. Revise this section as follows:

106.4.3 Validity of permit. The issuance of a permit or approval of plans and specifications shall not be construed to be a permit for, or an approval of, any violation of any of the provisions of this code or of any other applicable laws and regulations. Permits presuming to give authority to violate or cancel the

106.4.3 - 106.4.4

2001 SAN FRANCISCO BUILDING CODE

provisions of this code or other ordinances of the jurisdiction shall not be valid.

- The issuance of a permit based on plans, specifications and other data shall not prevent the Director from thereafter requiring the correction of errors in said plans, specifications and other data, or from preventing building operations being carried on thereunder when in violation of this code or other applicable laws and regulations.

Section 106.4.4. Replace this section with the following:

106.4.4 Expiration. Every permit issued by the Director under the provisions of this code, unless an extension of time has been specifically approved by the Director, shall expire by limitation and become null and void when the time allowed in Table A is reached, or when any of the following circumstances is applicable: [Amended 10-7-2003 by Ord. No. 245-03]

1. If the building or work authorized by such permit is not started within 90 days from the date of such permit, except for site permits with a valuation of \$2,500,000 or more and Director-initiated code compliance permits.

2. For site permits with a valuation of \$2,500,000 or more, the work shall start within 18 months or half the time period specified in Table A, whichever is the greater amount of time.

3. For Director-initiated code compliance permits, the work shall start within 30 days from the date of such permit.

4. If the building or work authorized is suspended or abandoned at any time after the work has started, for a period as follows:

4.1 Thirty days for Director-initiated code compliance permits.

4.2 Ninety days for all other permits.

5. An extension of time from the stated periods may be permitted for good reason, provided such requests for an extension are submitted to the Chief Building Inspector in writing prior to the end of the time period accompanied by payment of a fee. Unless approved by the Director, no more than three extensions of time may be granted. Any inspections performed during the extended portion of the life of the permit will require payment of inspection fees in addition to the extension of time shall not exceed the following time periods:

5.1 One hundred eighty days for site permits with a valuation of \$2,500,000 or more.

5.2 Thirty days for Director-initiated code compliance permits with a valuation of less than \$25,000.

5.3 Ninety days for all other permits. The maximum time allowed for Director-initiated code compliance permits shall be 12 months for all permits exceeding \$25,000 total valuation.

EXCEPTION: See Table 16B-A - Program Implementation Schedule - Footnotes 2 and 3.

6. A demolition permit shall expire 180 days after issuance. Only one extension of time of 90 days shall be granted upon written request to the Director.

7. The Director may administratively authorize the processing of applications involving compliance actions initiated by the Department, in a manner other than set forth in this code, so as to effect said compliance most expeditiously; provided, however, that due process is assured all applicants. In this regard, the Director may reduce the time periods set forth in this section as they apply to a second application and permit required by the Director to effect full compliance with this code and other applicable laws and regulations if by doing so code compliance would be more expeditiously accomplished.

Exhibit 12

NOTIFICATION TO ADJOINING PROPERTY OWNERS

<u>BLOCK</u>	<u>LOT</u>	<u>SUBJECT PROPERTY</u>	<u>OWNER</u>
4172	53	1189 Tennessee St.	Regan Carroll Trust (Appellant) 721 San Bruno Avenue San Francisco, CA 94107

	<u>ADJOINING PROPERTY</u>	
41	1169 Tennessee St.	1169-1177 Tennessee St., Inc. 1155 Tennessee St. SF, CA 94107
25	1193 Tennessee St.	Thomas Lundbergetal 237 Rose Ave. Mill Valley, CA 94941
38	2572 Third St.	2572-80 Third St. LLC
39	2576 Third St.	1608 Irving St.
54	2580 Third St.	SF, CA 94122

 Attorney for Appellant: Thomas Lippe, 329 Bryant St., #30, SF, CA 94107. Tel: 777-5600
 Fax: 777-9809.

 Feb. 14, 2007: Upon motion by Comm. Fung, the Board voted 4-0-1
 (Pres. Knox absent) to reschedule the matter to
 March 7, 2007.

March 21, 2007: Request for Rehearing will be considered by the Board of Appeals
 at its regular meeting of April 4, 2007.

April 4, 2007: Upon motion by Comm. Fung, Board voted 4-0-1 (Haaland
 absent) to continue for one year to be heard on April 2
 2008.

Post Cards Mailed 12/29/06

Index Cards Filed 12/29/06

Letter Notices Mailed 12/28/06

Notice sent to departments and appellant.

Exhibit 13



sfgov | residents | business | government | visitors | online services | search



Department of Building Inspection

Online Permit and Complaint Tracking

You selected:

Address: 1179 TENNESSEE ST

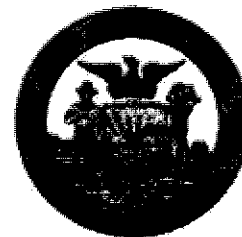
Block/Lot: 4172 / 042

Please select among the following links, the type of permit for which to view address information:

[Electrical Permits](#) [Plumbing Permits](#) [Building Permits](#) [Complaints](#)

(Building permits matching the selected address.)

Permit #	Block	Lot	Street #	Street Name	Unit	Current Stage	Stage Date
9902819	4172	042	1179	TENNESSEE ST		DISAPPROVED	12/08/2006



Technical Support for Online Services

If you need help or have a question about using this online service, please visit our [support area](#).

[contact us](#) | [accessibility policy](#) | [disclaimer](#) | [privacy policy](#)

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Department of Building Inspection

Online Permit and Complaint Tracking

Permit Details Report

Report Date: 11/16/2007 3:10:39 PM

Application Number: 9902819

Form Number: 2

Address(es): 4172 / 042 / 0 1179 TENNESSEE ST

Description: ERECT A FOUR STORY EIGHT UNIT RESIDENTIAL BLDG WITH COML

Cost: \$2,500,000.00

Occupancy Code: R-1,M,S-3

Building Use: 24 - APARTMENTS

Disposition / Stage:

Action Date	Stage	Comments
2/11/1999	FILED	
2/11/1999	FILING	
9/24/2002	FILED	
9/24/2002	PLANCHECK	
12/8/2006	DISAPPROVED	

Contact Details:

CASPAR MOL -

Contractor Details:

License Number: UNDECIDED
 Name: UNDECIDED UNDECIDED
 Company Name: UNDECIDED
 Address: UNDECIDED * UNDECIDED CA 00000-0000
 Phone:

Addenda Details:

Description:
 SITE PERMIT

Step	Station	Arrive	Start	In Hold	Out Hold	Finish	Checked By	Phone	Hold Description
1	CP-DR	3/8/01	3/8/01	3/8/01	8/6/01	8/6/01	PURVIS JONATHAN	415-558-6377	DR CASE # 010451D withdrawn 8/6/01
1	CP-NP	2/17/99	6/26/01	6/26/01	8/6/01	8/6/01	PURVIS JONATHAN	415-558-6377	Sec 311 mailed 6-26-01 exp 7-26-01
1	CP-ZOC		6/26/01	6/26/01	8/6/01	8/6/01	USER DCP	415-558-6377	APPROVED

2	FIRE	2/10/00	2/10/00	8/21/02		8/21/02		415-558-6177	Approved by Jim Gravanis
3	PAD-MAJ	3/9/00	3/9/00	8/23/02		8/28/02	CHEN JOHN	415-558-6133	
4	PAD-CLRK	5/3/02	5/3/02			5/28/02	BARTHOLOMEW IRENE	415-558-6133	CANCEL 05/26/02; EXT 07/25/02
5	DPW-BSM	9/11/02	9/16/02			9/16/02	GAIME BERHANE	415-558-6060	DPW/BSM shall not release construction addenda until SI is applied and approved.
6	CP8	9/24/02	9/24/02			9/24/02		415-558-6070	APPRVD, YL8 (DUPLICATE)
7	PAD-MAJ	8/9/01	8/28/02	9/20/01		8/28/02	CHEN JOHN	415-558-6133	Site permit, route to ME
8	PAD-MECH	9/21/01	9/25/01			9/25/01	BREE ARTHUR	415-558-6133	
9	CP-ZOC	8/28/02	9/10/02			9/10/02	PURVIS JONATHAN	415-558-6377	APPROVED R-5
10	HIS	9/18/02	9/18/02			9/18/02	DAVISON ALAN	415-558-6220	
11	ONE-STOP	9/20/02	9/24/02			9/24/02	TJOE MAOE	415-558-6649	
12	CPB	7/5/05	11/15/05			11/17/05	LEE ANITA	415-558-6070	ROUTE BCK TO DCP PER CORRETTE MOSES
13	CP-ZOC	11/17/05					SNYDER MATHEW	415-558-6377	Do Not Issue; send back to Planning
14	CPB	12/8/06	12/8/06			12/8/06	LEE ANITA	415-558-6070	DAPVD PER DCP 11/27/06 GJS/ROUTE TO BPA PER SIMON TAM ON 12-21-06
15	BPA	12/21/06						415-575-6880	SIMON TAM
16	FIRE							415-558-6177	
17	HIS							415-558-6220	
18	ONE-STOP							415-558-6649	

Station Code Descriptions and Phone Numbers

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 [accessibility policy](#) |
 [disclaimer](#) |
 [privacy policy](#)
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Department of Building Inspection

Online Permit and Complaint Tracking

Permit Addenda Details Report

Report Date: 11/16/2007 3:18:52 PM

Application Number: 9902819

Form Number: 2

Address(es): 4172 / 042 / 0 1179 TENNESSEE ST

Description: ERECT A FOUR STORY EIGHT UNIT RESIDENTIAL BLDG WITH COML

Cost: \$2,500,000.00

Occupancy Code: R-1,M,S-3

Building Use: 24 - APARTMENTS

Disposition / Stage:

Action Date	Stage	Comments
-------------	-------	----------

Contact Details:

CASPAR MOL -

Contractor Details:

License Number: UNDECIDED
 Name: UNDECIDED UNDECIDED
 Company Name: UNDECIDED
 Address: UNDECIDED * UNDECIDED CA 00000-0000
 Phone:

Addenda Details:

Description: FINAL

Step	Station	Arrive	Start	In Hold	Out Hold	Finish	Checked By	Hold Description
1	PAD-MAJ	7/21/03	8/12/03	8/13/03		11/10/05	CHEN JOHN	Rev. 8, reapproved due to revision requested from fire
2	PAD-MECH	8/18/03	9/11/03	9/17/04		11/2/04	HU TIECHENG	
3	FIRE	11/19/04	12/2/04	12/2/04		6/27/05	DEBELLA AL	
4	DPW-BSM	11/19/04	11/24/04	11/24/04		6/28/05	MINIANO DANNY	DPW/BSM sign off on job card (04IE-341) REQUIRED PRIOR TO DBI FINAL. AS NOTED ON PLANS. READY to approve this one. per nick E Sujet to 04IE-341
5	CP-ZOC	6/30/05	6/30/05			6/30/05	PURVIS JONATHAN	
6	ONE-STOP	7/1/05	7/1/05			7/1/05	TJOE MAOE	
7	PAD-MAJ	11/10/05	11/10/05			11/10/05	CHEN JOHN	
	ONE-							

8	STOP	11/14/05	11/14/05		11/14/05	TJOE MAOE	
9	CP8	11/14/05	11/14/05		11/16/05	LEE ANITA	ADDENDUM ROUTE TO OCP PER MOSES CORRETTE ON 11/17/05
10	CP-ZOC						

T
If
SI

Station Code Descriptions and Phone Numbers

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GO!

Department of Building Inspection

Online Permit and Complaint Tracking

You selected:

Address: 1169 TENNESSEE ST

Block/Lot: 4172 / 038

Please select among the following links, the type of permit for which to view address information:

[Electrical Permits](#) [Plumbing Permits](#) [Building Permits](#) [Complaints](#)

(Building permits matching the selected address.)

Permit #	Block	Lot	Street #	Street Name	Unit	Current Stage	Stage Date
200708109365	4172	041	1169	TENNESSEE ST		ISSUED	11/15/2007
200708210388	4172	041	1169	TENNESSEE ST		ISSUED	08/21/2007
200707106403	4172	041	1169	TENNESSEE ST		ISSUED	07/24/2007
200701192080	4172	041	1169	TENNESSEE ST		ISSUED	03/12/2007
200605262597	4172	041	1169	TENNESSEE ST		ISSUED	07/14/2006
M38388	4172	041	1169	TENNESSEE ST		ISSUED	07/06/2006
200410217428	4172	041	1169	TENNESSEE ST		ISSUED	04/12/2006
1 2 3							

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Department of Building Inspection

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200701192080	4172	041	1169	TENNESSEE ST		ISSUED	03/12/2007
200605262597	4172	041	1169	TENNESSEE ST		ISSUED	07/14/2006
M38388	4172	041	1169	TENNESSEE ST		ISSUED	07/06/2006
200410217428	4172	041	1169	TENNESSEE ST		ISSUED	04/12/2006
M35929	4172	041	1169	TENNESSEE ST		ISSUED	01/10/2006
9906329	4172	038	1169	TENNESSEE ST	0	EXPIRED	11/22/2005
9906329	4172	011	1169	TENNESSEE ST		EXPIRED	11/22/2005
99063305	4172	038	1169	TENNESSEE ST	0	EXPIRED	11/22/2005
99063305	4172	011	1169	TENNESSEE ST		EXPIRED	11/22/2005
200411229900	4172	041	1169	TENNESSEE ST		ISSUED	01/27/2005
200307109174	4172	041	1169	TENNESSEE ST		ISSUED	08/22/2003
200109218969	4172	041	1169	TENNESSEE ST		EXPIRED	09/21/2002
8609542	4172	038	1169	TENNESSEE ST	0	EXPIRED	08/07/1987
8609542	4172	011	1169	TENNESSEE ST		EXPIRED	08/07/1987

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Exhibit 14



DEPARTMENT OF BUILDING INSPECTION

CITY & COUNTY OF SAN FRANCISCO

1660 MISSION STREET, SAN FRANCISCO, CALIFORNIA 94103-2414

December 8, 2006

Reoan Carroll
1155 Tennessee Street
San Francisco, CA 94107

BUILDING APPLICATION(S): 9902819'S'
JOB ADDRESS: 1179 Tennessee Street

Dear Applicant(s):

The above referenced applications have **"NOT BEEN APPROVED"** by The Department of City Planning because the information contained on the applications and/or the plans are improper to grant approval. Therefore, unless revised information is submitted and the application(s) is/are made approvable within 21 days from the above date, you are hereby notified that your application(s) for a building permit at the above noted address(es) will be cancelled on December 29, 2006

However, if you choose to file an appeal with the Board of Appeals, you must request that your application be **"DISAPPROVED"** per Section 106.3.8 of the San Francisco Building Code. A "Request for Disapproval of Building Permit Application" form is attached. The request must be filed with the Department of Building Inspection within 21 days from the above date. Upon receipt of the written request for disapproval, a written notice will be sent to you indicating that your application has been disapproved.

To file an appeal with the Board of Appeals, you may file an appeal in person with the Technical Services Division, 1st Floor, 1660 Mission Street, San Francisco, Attention: Simon Tam within fifteen (15) days from the date of the disapproval letter. If you have any questions regarding the appeal, please call Simon Tam at (415)558-6084.

A ONE TIME EXTENSION OF 60 DAYS, AT ANY POINT DURING THE APPROVAL PROCEDURE, MAY BE GRANTED BY THE DIRECTOR UPON WRITTEN REQUEST BY THE APPLICANT(S) WITH A NON REFUNDABLE PAYMENT OF \$32.66, PER APPLICATION, MADE PAYABLE TO DEPARTMENT OF BUILDING INSPECTION.

If you have further questions, please call our office at (415)558-6070.

Very truly yours,

/s/

Amy Lee/Acting Director
Anita Lee/Manager
Central Permit Bureau

ATTACHMENT

CERTIFIED MAIL RETURN RECEIPT ON FILE

Law Offices of
THOMAS N. LIPPE

329 Bryant Street
Suite 3D
San Francisco, California 94107

Telephone: 415-777-5600
Facsimile: 415-777-9809
Email: Lippelaw@sonic.net

December 20, 2006

Ms. Amy Lee
Department of Building Inspection
City and County of San Francisco
1660 Montgomery St.
San Francisco, CA 94103-2414

Re: Building Permit Application No. 9902819'S'; 1179-1189 Tennessee St.

Dear Ms. Lee:

This office represents the applicants, Mr. Regan Carroll and the Trust of Regan Carroll, with respect to this permit application. I am writing in response to your letter dated December 8, 2006 to Mr. Carroll regarding this permit application. Mr. Regan Carroll is submitting the executed "Request for Disapproval of Building Permit Application." I am writing this letter to clearly explain Mr. Carroll's intent in submitting the "Request for Disapproval of Building Permit Application."

As you know, Mr. Carroll has already filed an action in the Superior Court entitled *Carroll v. City and County of San Francisco*, Superior Court Case No. CPF-06-506816 for a court order requiring the City to issue this permit based on the Permit Streamlining Act. Mr. Carroll believes that the causes of action alleged in that action are ripe for adjudication now, without the need for further action by the Board of Appeals or other City agencies, and without the need for Mr. Carroll to exhaust any additional administrative remedies.

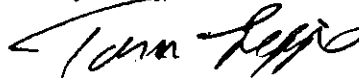
Nevertheless, the City may take the position in Case No. CPF-06-506816 that your December 8, 2006 letter to Mr. Gee, which provides Mr. Carroll with the opportunity to submit a "Request for Disapproval of Building Permit Application" for the purpose of prosecuting an appeal to the Board of Appeals represents an available administrative remedy that Mr. Carroll is required to exhaust before prosecuting the causes of action alleged in Case No. CPF-06-506816. Therefore, in order to moot any such contentions, Mr. Carroll is submitting the "Request for Disapproval of Building Permit Application," and, once it is "Approved for Disapproval," he will file and prosecute a Notice of Appeal to the Board of Appeals. However, Mr. Carroll takes this action without prejudice to his right to maintain and prosecute the causes of action alleged in Case No. CPF-06-506816, and Mr. Carroll does not concede that he is required to take this action in order to prosecute that case.

Ms. Amy Lee
December 20, 2006
Page 2

Further, Mr. Carroll reserves the right to object to the Board of Appeals' jurisdiction to hear any such appeal, and by taking the actions described herein, Mr. Carroll does not, and does not intend to, waive any such objection.

Thank you for your attention to this.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Tom Lippe", written over the printed name.

Thomas N. Lippe

cc: Regan Carroll

c053 to DB1 re Request for Disapproval.wpd



DEPARTMENT OF BUILDING INSPECTION

City & County of San Francisco

1660 Mission Street, San Francisco, California 94103-2414

ATTACHMENT

REQUEST FOR DISAPPROVAL OF BUILDING PERMIT APPLICATION

Date: 12/20/06

Mr. Simon Tam
Board of Permit Appeals
Customer Services Division
Department of Building Inspection
1660 Mission Street, 1st Floor
San Francisco, CA 94103-2414

Dear Mr. Tam: As described in the attached letter of today's date from Thomas Lippe to Amy Lee, I request that my Building Permit Application No. 9902819's be disapproved for the purpose of taking the matter before the Board of Appeals. I understand that the other Checking Stations may not have concluded their portion of the review necessary to approve the application for a building permit.

I agree that the application shall be returned to: Planning & Building Dept for continuation of the permit processing after the Board of Appeals decision, if I wish to continue to pursue the permit.

Applicant's Signature

Print Name:

Regan Carroll

Mailing Address:

40 Law Offices of Thomas N. Lippe

329 Bryant St, Suite 3D

San Francisco, CA 94107

Contact Phone No. (415) 777-5600

APPROVED FOR DISAPPROVAL BY:

Simon Tam
Simon Tam

Date:

12/20/06